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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-9127

EDWARD V. HANRAHAN; RICHARD S. JALOVEC; DANIEL GROTH; RAYMOND BRODERICK; EDWARD CARMODY; JOHN CISZEWSKI; WILLIAM CORBETT; JAMES DAVIS; JOSEPH GORMAN; LYNWOOD HARRIS; ROBERT HUGHES; GEORGE JONES; PHILIP JOSEPH; WILLIAM KELLY; JOHN MARUSICH; JOHN MULCHRONE; HARRY ERVANIAN; JOHN MEADE; ROBERT KUKOWINSKI; and JOHN SADUNAS,

Petitioners,

vs.

IBERIA HAMPTON, Administratrix on behalf of the Estate of FRED A. HAMPTON, Deceased; FANNIE MAE CLARK, Administratrix on behalf of the Estate of MARK CLARK, Deceased; VERLINA BREWER; DEBORAH JOHNSON; RONALD SATCHEL; HAROLD BELL; BLAIR ANDERSON; BRENDA HARRIS; and LOUIS TRUELOCK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOHN O. TUOHY
Special Assistant Corporation Counsel, City of Chicago
111 West Washington Street
Chicago, Illinois 60602

JOHN P. COGHLAN
Special State's Attorney of Cook County
JOSEPH S. WITKOWSKI
Assistant Special State's Attorney
111 West Washington Street
Chicago, Illinois 60602

Counsel for Petitioners

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioners herein are EDWARD V. HANRAHAN, RICHARD S. JALOVEC, DANIEL GROTH, RAYMOND BRODERICK, EDWARD CARMODY, JOHN CISZEWSKI, WILLIAM CORBETT, JAMES DAVIS, JOSEPH GORMAN, LYNWOOD HARRIS, ROBERT HUGHES, GEORGE JONES, PHILIP JOSEPH, WILLIAM KELLY, JOHN MARUSICH, JOHN MULCHRONE, HARRY ERVANIAN, JOHN MEADE, ROBERT KUKOWINSKI and JOHN SADUNAS.

Petitioners pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on April 23, 1979, and from the order denying Petition for Rehearing and Suggestions for Rehearing *En Banc* entered September 12, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 600 F.2d 600 (7th Cir. 1979) and appears in Appendix A hereof. The order of the Court of Appeals dated September 12, 1979 denying Petition for Rehearing and Suggestions for Rehearing *En Banc* is not reported and appears in Appendix B hereof. The orders (opinions) of the District Court dated June 20, 1977 and April 15, 1977 directing verdicts for Defendants are not reported and appear in Appendices C and D respectively hereof.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on April 23, 1979, with Judge Wilbur F. Pell dissenting. A timely petition for rehearing and rehearing *en banc* was denied by a tie vote (3-3) by Judges Fairchild, Swygert and Cummings on September 12, 1979, with Judges Tone, Pell and Sprecher voting for rehearing. Judges Bauer and Wood recused themselves.

This Petition for Certiorari was filed within 90 days after the denial of the Petition for Rehearing *En Banc*. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I.

Whether municipal officials have absolute immunity from liability under 42 U.S.C. § 1983, *et seq.*, for quasi-judicial acts performed during an internal police disciplinary hearing when acting within the scope of the exercise of statutory duties?

II.

Whether a reviewing court may, in a civil case, for discovery purposes, compel disclosure of the identity of a second confidential informant on a search warrant, after identity of the first, an FBI paid undercover Black Panther, has been disclosed, where the warrant is valid based on the information from the disclosed informant alone (also corroborated by the search). Whether the reviewing court may compel disclosure without a trial court hearing?

III.

Whether a prosecutor is absolutely immune from liability for acts done in authorizing, drafting and/or reviewing the application to a court for a search warrant, and necessary attendant acts performed within the scope of his duties and his prosecutorial capacity to carry out the order of the court commanding the search?

IV.

Whether testimony of a witness in a prior proceeding may be used to create liability for the witness under 42 U.S.C. §§ 1983, 1985(3) or 1986?

V.

Whether liability exists under 42 U.S.C. § 1983, *et seq.* without evidence of actual knowledge of the alleged wrongful conduct of subordinates? May a person be held liable for the alleged constitutional torts of another only because he is the supervisor of the latter?

VI.

Whether a conspiracy may exist where there is no proof that Defendants know about the object of the conspiracy and where Plaintiffs admit that fact? Must invidiously discriminatory animus be proved against each alleged conspirator under 42 U.S.C. § 1985(3)?

VII.

Whether there is a cause of action for conspiracy to violate 42 U.S.C. § 1983 since *Chapman v. Houston Welfare Rights*, ... U.S. ....., 60 L.Ed 2d 508, 522 (1979) holds that no substantive rights were created by 42 U.S.C. § 1983?

VIII.

Whether a defendant in an action under 42 U.S.C. § 1983, *et seq.* has the burden of showing good faith, or does Plaintiff have the burden of showing Defendant's bad faith? Is the "good faith" of a defendant which was shown during Plaintiffs' case sufficient to direct a verdict in favor of the Defendant, or is the question of "good faith" always a jury question?

IX.

On a vote to hear *en banc*, whether a Judge may recuse; and if so, must he be replaced and the litigants afforded both notice in advance of the vote, of such *en banc* recusal, and of the replacement and recusal

procedure established by the circuit? On request for *en banc* rehearing, whether a litigant is entitled to consideration of his petition by a full circuit of active sitting judges?

X.

Whether a prosecutor, or a policeman who served a warrant, may be held liable under 42 U.S.C. § 1983, *et seq.*, for public statements made after arrest, concerning the service of a search warrant, use of weapons, resistance, description of the physical evidence seized, and substance of the charges, in response to prior instant public accusations of murder made against them, without evidence that those statements were an imminent threat to, or reasonably likely to interfere with, or did prejudice a fair trial of those arrested?—Especially where no trial of the charges was ever had?

XI.

Whether under 42 U.S.C. § 1988 Plaintiffs may be awarded appellate attorneys' fees while the question of liability and alleged civil rights violation are still pending in the Trial Court, there being, as a consequence, no "prevailing party" as required by 42 U.S.C. § 1988? Does the Court of Appeals ruling in this respect violate Petitioners' right of due process under the 5th Amendment as construed and applied?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involved the First and Fifth Amendments to the United States Constitution and 42 U.S.C. §§ 1983, 1985(3), 1986 and 1988.

1. First Amendment to the United States Constitution:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

2. Fifth Amendment to the United States Constitution:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

3. 42 U.S. Code, Section 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

4. 42 U.S. Code, Section 1985(3):

"If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

5. 42 U.S. Code, Section 1986:

"Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses to do so, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may

be joined as defendants in the action; and if the death of any party be caused by any such wrongful act or neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued."

6. 42 U.S. Code, Section 1988:

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. § 1681, *et seq.*], or in any civil action or proceedings, by or on behalf of the United States of America, to enforce, or charging a violation of a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d, *et seq.*], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

This case presents to this Court for review the conduct of an FBI informant, three Federal and twenty local law enforcement agents in combating illegal acts of a group who in the eyes of these law enforcement officials have employed terrorist tactics, including violence, to achieve their ends.

The case arose during the 1960's—a time of upheaval, turmoil and tension throughout the United States—a decade marked with the infamy of the assassinations of President John F. Kennedy in 1963, his brother, Sen. Robert Kennedy, and Rev. Dr. Martin Luther King, Jr., in 1968. The Viet Nam War ripped the country in two. Riots, racial disturbances, street demonstrations, student walkouts and campus takeovers* occurred. It was a time when the rule of law didn't always rule. Many organizations were formed protesting their causes. One was the Black Panther Party.

The Black Panther Party was a militant, Black extremist, paramilitary, uniformed organization formed in Oakland, California in 1966. It was a violent, revolutionary organization. (Tr. 5755). Violence prone, by party edict its members were required to own and know how to use weapons or have access to 3 weapons. (Tr. 5766, 8464).

* This court looked at the campus and described the milieu: " . . . the setting in 1969-70. A climate of unrest prevailed in many college campuses in this country. There had been widespread civil disobedience on some campuses, accompanied by the seizure of buildings, vandalism and arson. Some colleges had been shut down altogether, while at others files were looted and manuscripts destroyed." *Healy v. James*, 408 U.S. 169, 171 (1972).

Panther publications called for killing policemen. (Tr. 6406). The Party's policy was that if at least one shot was not fired by a member being arrested then the Party would not stand behind that member. (Tr. 6625). Panthers were called on to "revolt", to "arm" themselves, to "dynamite", to "kill the pigs everywhere", to "not dissent from American government, we will overthrow it", and "political power grows out of the barrel of a gun". (PX 51).* The Black Panthers published a "Destruction Kit" which describes how to make and use incendiary bombs and other devices. (Tr. 8275). The Panthers as part of their political orientation classes furnished at some programs, including the Breakfast for Children Program (Tr. 8537, 8540), a "Black Panther Coloring Book" depicting in cartoons pictures of children killing policemen. (DX 97, Tr. 15200). ("The youth we are feeding will surely feed the revolution.") *The Black Panther*, June 14, 1969 (DX 30). The Illinois Chapter of the Black Panther Party set out;

> "at once to implement the National Party's analysis and program; America is imperialist and racist; the black community is an imperial colony; the revolutionary struggle of the black colony will be the vanguard of the class struggle; and struggle required the leadership of an armed revolutionary party . . . [and they are] . . . neither a political party with a subordinate military arm nor a partyless military force . . . [but they are] . . . simultaneously a military and political organization with leaders holding both military and political ranks." *The Black Panther*, May 31, 1969. (FDX 37).

One of the Party's documents seized in an F.B.I. search on June 4, 1969 at headquarters at 2350 West

* Citations to Exhibits are: PX means Plaintiffs' Exhibit; DX means State Defendants' Exhibit; FDX means Federal Defendants' Exhibit.

Madison in Chicago was a "Contingency Plan for Takeover of the State of Illinois", a portion of which called for assassination of law enforcement and government officials. (Tr. 5771).

There had been numerous shooting confrontations and clashes between the Panthers and police prior to December 4, 1969, both nationally and locally.* Several policemen had been wounded, some Panthers shot. (Tr. 5767, Tr. 6783-7). There had been shootouts with Chicago Police at the Black Panther Party headquarters—a block from the apartment—at 2350 West Madison Street on July 31, 1969 and October 4, 1969. (DX 108). On November 13, 1969 Chicago Police Officers Gilhooly and Rappaport were murdered in an

* Numerous additional acts of violence and/or terrorism, including the making of incendiary devices, acquisition of weapons, reported plots to bomb the White House, poison dignitaries, etc. are set out in FBI documents. (DX 69, Tr. 10660; DX 110, Tr. 10685; DX 111, Tr. 10692-4; DX 112, Tr. 10697; DX 113, Tr. 10704; DX 114, Tr. 10706; DX 115, Tr. 10715; DX 116, Tr. 10727; DX 118, Tr. 10774; FDX 13, Tr. 10922).

For details of such activities see Judge Pell's dissent in the opinion below (A. 97-100), and House Com. On Internal Security, The Black Panther Party, its origin and development as reflected in its weekly newspaper, October 6, 1970 (91st Cong. 2d Sess.), see also: *Forsyth v. Kleindienst*, 599 F.2d 1203, 1206 (3rd Cir. 1979). Attorney Gen. Mitchell states in an affidavit that the Black Panther Party made foreign contacts ". . . for the purpose of obtaining foreign funds to support Black Panther revolutionary activities, including the advocacy of the violent overthrow of existent Federal and state government structures." This perceived threat was considered to be especially serious to the Attorney General in view of ". . . (3) the numerous threats of personal attack that were being directed by the Black Panther Party against local law enforcement officers and even against the President of the United States and (4) the seditious plan which had been prepared by the Black Panther Party to overthrow the government of the *State of Illinois* . . ." *Burkhart v. Saxbe*, 448 F.Supp. 588, 597 (D.C. E.D. Pa. 1978) (emphasis added).

ambush-shootout with Panther Spurgeon Jake Winters. Winters was killed in the incident and seven other Chicago Police Officers were wounded. (Tr. 6788, DX 89).

This background was the climate of the times preceding the events of December 4, 1969 when at approximately 4:45 A.M. fourteen Chicago police, five Black and nine White, served a search warrant, issued by an Illinois State Judge. The face of the warrant said there was probable cause and commanded a search for illegal weapons at the first floor apartment at 2337 West Monroe (Panther apartment), in Chicago. At this inner city apartment, 19 unregistered firearms, including 12 shotguns and rifles and 7 handguns were found. Two shotguns were sawed off, one to an illegal length, one other shotgun was a stolen Chicago Police Department riot shotgun.

Fred Hampton and Mark Clark, Black Panther Party leaders, were killed. Four of the other seven apartment occupants received gunshot wounds. One policeman received a gunshot wound in the leg and another, a wrist cut.

Seven occupants and representatives of Clark and Hampton (Respondents here) sued for alleged violation of their constitutional rights under 42 U.S.C. §§ 1983, 1985 and 1986.

Petitioners, designated as "State Defendants", are eighteen police officers, the then State's Attorney of Cook County, Illinois and an Assistant Cook County State's Attorney. Others separately petitioning this court for Writ of Certiorari are three (FBI) Special Agents and an FBI informant, frequently referred to as Federal Defendants.

The trial began on January 5, 1976. At the close of the Plaintiffs' case, almost sixteen months later, the District Court on April 15, 1977 directed verdicts for all Defendants except the seven police officers who fired their weapons in the apartment. On June 20, 1977 after the jury was deadlocked (4-2 for the police officers), Defendants were granted judgment on their motion for directed verdicts made at the close of all evidence. On April 23, 1979, the United States Court of Appeals, Seventh Circuit, in a panel opinion of Judge Swygert, Judge Fairchild specially concurring, Judge Pell dissenting, reversed the directed verdicts as to all but three State Defendants. A timely petition for rehearing and suggestion for rehearing *en banc*, filed by each set of Defendants was denied on September 12, 1979 by court order, Judges Tone, Sprecher and Pell voting in favor of rehearing, Judges Swygert, Fairchild and Cummings against rehearing. Judges Bauer and Wood recused themselves.

I.
SINGLE CONSPIRACY

Plaintiffs tried their case on a single conspiracy theory. Plaintiffs' Petition for Mandamus (Hampton, et al. v. Hanrahan, et al., 75-1391 (7th Cir. 1975), (Tr. 31, January 5, 1976; Tr. 2953-7, January 28, 1976); Amended and Consolidated Complaint and, argument on directed verdict. At the core of this conspiracy, it was claimed, was the FBI's Counterintelligence Program (Cointelpro). Appellants' Motion for Recusal of Judge Wilbur F. Pell. The existence of Cointelpro, however, was never disseminated outside the FBI (Marlin Johnson Tr. 5411, PX 1-20), and couldn't be without violating the law. (*Id.*, Tr. 5429). No programs, policies or objectives of Cointelpro were ever told to any of the

State Defendants. (Tr. 5401). Plaintiffs' attorney even admitted that Hanrahan was *never* told of the program and ". . . the ball was hidden from Hanrahan with regard . . . to the program, and Plaintiffs were accepting Hanrahan's answers on this issue." (Tr. 26921-2).

II.
INFORMATION LEADING TO THE WARRANT

In 1969 Federal Defendant William O'Neal was a member of the Black Panther Party in Chicago and an informant for the FBI. His FBI contact agent was Federal Defendant, Roy Mitchell. O'Neal's reliability as an informant had been confirmed prior to November 19, 1969, when he told Mitchell that there were numerous firearms stored in the Panther apartment, including a stolen Chicago police shotgun, numerous rounds of ammunition, a sawed-off shotgun and among other items, gas masks. (PX 22-3). When he met with O'Neal, Mitchell sketched the interior of the apartment based on O'Neal's information. (Tr. 6824, 6883). Mitchell then orally informed State Defendant, Assistant State's Attorney Jalovec about the apartment layout and the firearms. Mitchell testified he never told Jalovec, Sgt. Groth or State's Attorney Hanrahan (he never met with Hanrahan) where Hampton or Johnson or Truelock slept in the Panther apartment. (Tr. 8224-8). There was no evidence Mitchell gave the FBI file sketch of the apartment to any State Defendant either in the form provided by O'Neal or in the detail appearing in PX 21. (Tr. 8228).

Sgt. Groth had his own informant who by telephone on December 2, 1969 told Groth that firearms and ammunition were stored at the premises (Tr. 25062-3, 25076-7, 25304), confirming the presence of sawed-off shotguns,

along with other weapons and ammunition thus corroborating Mitchell's information through O'Neal. (DX 119, Tr. 25076-7, 25304).

Based upon this information, Jalovec, an Assistant State's Attorney, prepared the Complaint for Search Warrant, which Groth signed and then alone brought to a Judge, who after a short hearing, signed a court order on December 3, 1969 issuing the warrant and commanding the search of the apartment. (Tr. 24410-14). The warrant is valid, complete and regular on its face (DX 119), and has never been held by any court to be otherwise.

Hanrahan met with Jalovec some time after noon on December 3, 1969, examined the warrant, either before or after the judge signed it, and then cautioned Jalovec to tell the men to be careful. (Tr. 24529).

III.

PLANNING SERVICE OF THE SEARCH WARRANT

Sgt. Groth alone prepared the plan for serving the search warrant. (Tr. 25415, PX DG-7). Fourteen police officers under Groth's command drove to the apartment after a 4:00 A.M. briefing at the State's Attorney's Office on the morning of December 4, 1969. (Tr. 25399-401). All were named defendants herein. Of these, five were Black and the rest were White.

Pursuant to Groth's plan (Tr. 34405-8, PX DG-7), five went up the front steps of the apartment. Two police officers were stationed at or near the parkway in front of the building. The rest of the 14 police officers were to cover the rear of the premises.

The early morning hours were selected for the timing of the search based *inter alia* upon recommendations

contained in police department training manuals and for the element of surprise. (Tr. 23502-10). Groth as a policeman made this decision, not Jalovec. (Tr. 24506-7). Illinois law provided that a search warrant may be served at any time of the day or night. Ill. Rev. Stat. 1969, Ch. 38, § 108-13.

IV.

WHAT HAPPENED AT THE APARTMENT

A. Police Officers Who Did Not Fire Weapons.

The seven officers who participated in serving the search warrant and did not fire their weapons were William Corbett, Lynwood Harris, Fred Howard*, Robert Hughes, Philip Joseph, William Kelly and John Marusich.

No Plaintiff has identified any one of these officers for any purpose whatsoever before, during or after the search. There was no evidence that any of these officers fired their weapons or in any way were the proximate cause of any injury to any Plaintiff at any time. At the conclusion of the Plaintiffs' case, the motion for a directed verdict as to these Defendants was granted by the District Court as to all counts, including the conspiracy counts.

There was no evidence that these police officers ever knew any of the Federal Defendants at any time before the trial began, nor agreed with, conspired with or acted in concert with the Federal Defendants or knew that Cointelpro existed or knew anything about it or had ever heard of that word before this trial.

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* Howard died long prior to the trial. The District Court dismissed the complaint against Howard since his estate was never served. (Tr. 2643). Plaintiffs did not appeal this decision.

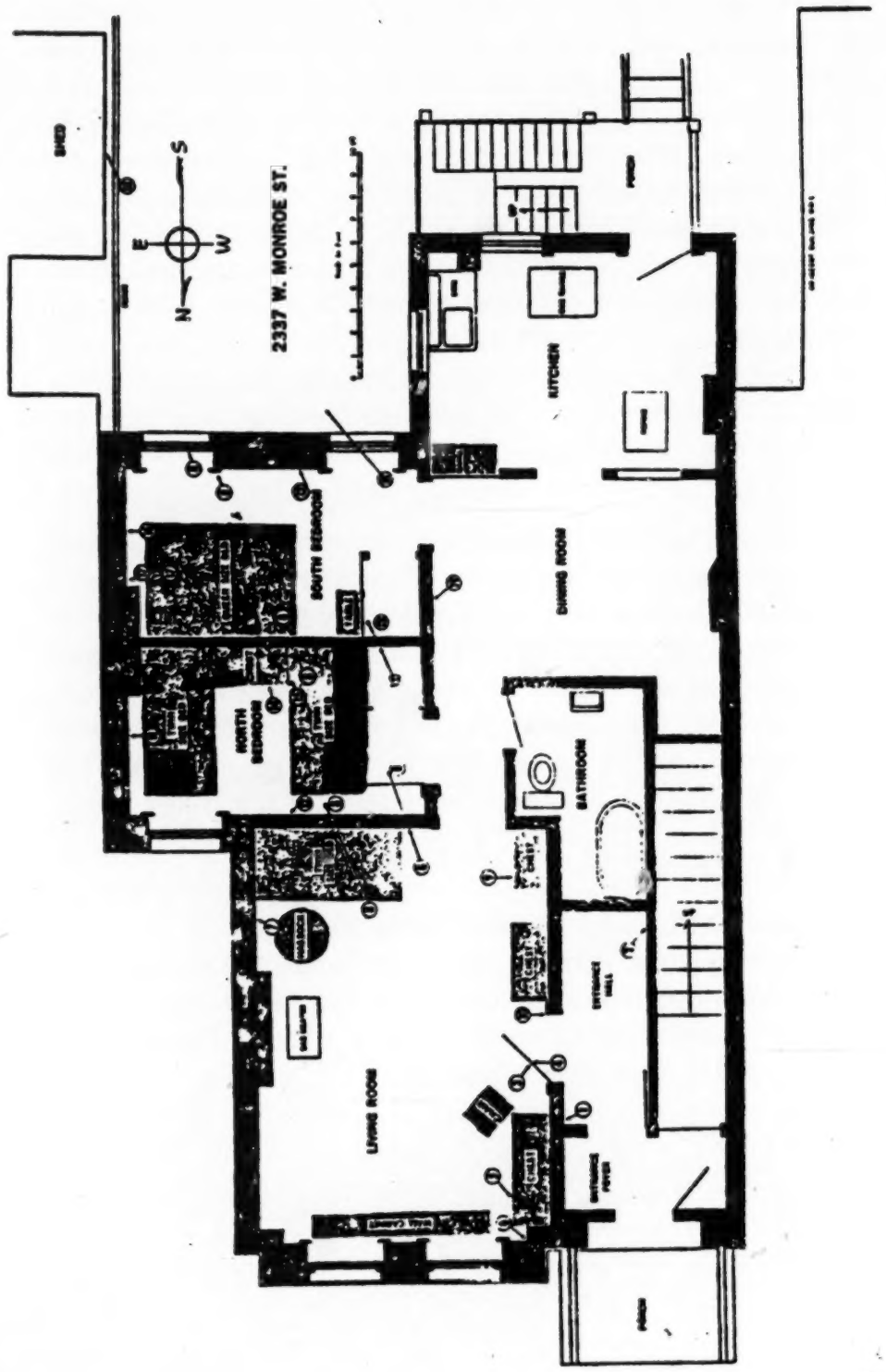
B. THE DEFENDANT POLICE OFFICERS WHO FIRED THEIR WEAPONS.

The police officers who fired their weapons during the service of the warrant were as follows: Groth, Davis, Gorman and Jones, who entered the front door; and Carmody, Broderick and Ciszewski who entered the back door. Their motion for a directed verdict at the conclusion of the Plaintiffs' evidence on liability was not granted. All these officers testified at the trial in either Plaintiffs' or Defendants' case, and at the conclusion of all of the evidence they moved for a directed verdict which was taken under advisement. The jury deadlocked (4 to 2 in favor of Defendants) after deliberating for four days. When the jury reported that it was hopelessly unable to return a verdict, the Defendants moved for judgment on their motions for a directed verdict which the Court granted.

The evidence and testimony with respect to each of these Defendant officers concerning the firing of weapons at the apartment and the evidence and testimony with respect to the Plaintiffs concerning this matter was as follows:

1) *The Front Door and Living Room.*

a) Davis, flanked by Jones and Gorman, was next to Groth, who loudly rapped on the door of the apartment, announced his office and commanded the occupants to open the door and said he had a search warrant. (PX 449, PX DG-12, Tr. 33046-52). A voice from inside said, "Wait a minute" but the door was not opened. (Tr. 33961-3). Groth knocked a second time. There was no response. Noises were heard that sounded like movement within the apartment. (Tr. 33050-2, PX 449). Groth commanded Davis to break open the door (door #2) which he did, immediately entering a darkened hallway.



(Tr. 33840-7). Davis, realizing he was not yet in the apartment, continued on and hit the next door (door #3) with his left shoulder and about the same time, heard a shot, as he was going through this door. (Tr. 33847-51). The flash from that shot illuminated the room as he went through the door. When he entered the room all the lights were off. (Tr. 33772, 17803, 17821, 17826, 18162). He hurled himself across and toward the middle of the living room facing Plaintiff Harris. The first thing Davis saw was Harris sitting on the bed along the south wall of the living room with her shotgun pointing toward the door. (Tr. 33851-3). He observed her fire her weapon in the direction of the door. He fired one shot at her hitting her in the leg. (Tr. 33866-75).

On later investigation, he determined that the first shot he heard was a shotgun blast fired by Mark Clark into and through the living room door as Davis entered through that door. (Tr. 33855). Because Davis had crouched as he opened the door, he was not hit. The projectile fired by Clark was a rifled deer slug, later recovered, which was found to have pierced the southwest corner of the hallway outside the living room. (Tr. 19673, 25755, 33053-7, 33190, 33194, 33885, 34017, 34028, 13951).

When he fired at Harris, Davis observed Clark to his right behind the same living room door (#3) rising off a chair or stool. Clark appeared to be pumping his shotgun and was turning toward Davis. Davis fired three shots at Clark while rushing at him, grabbed Clark, momentarily struggled and they fell to the floor when Clark went limp. (Tr. 33876-85, 33930, 33947-54, 33981, 33961-71). Only Brenda Harris and Clark were in the living room after Davis entered. (Tr. 18176). Harris was injured, Clark was dead.

Davis observed a man with a shotgun down the hallway at the south bedroom doorway (Tr. 33984), and heard gunshots from the rear. (Tr. 33994). He saw flashes from the south bedroom. (Tr. 33986-7). Because Davis observed shooting from the *north and south* bedrooms, he fired through the wall of the living room over the bed that Brenda Harris was on and above her so as not to hit her. (Tr. 34036-7, 34045-7). Davis heard Groth order a cease fire three times. (Tr. 34048). After the cease fires, firing resumed from the bedrooms and Davis heard somebody from the bedroom yell, "Shoot it out". (Tr. 34045-7). Davis never went beyond the living room while he was in the apartment. (Tr. 34052).

b) Defendant Sgt. Daniel Groth, while in the squad car on the way to serve the search warrant, called the Chicago Police radio operator and asked for an assist from beat cars as back-up at the front and rear doors of the premises. (Tr. 33144, PX DG-12, PX 449). Those squad cars came to the scene at the time of the shooting and after the incident. (Tr. 33046, DX 278).

Groth observed Brenda Harris on the bed along the south wall of the living room pointing a shotgun in the direction of the door as Davis went through it (PX DG-12), and observed her fire in the direction of the door with her shotgun; he fired a shot in her direction. (PX DG-12, 449). After entering the living room he called for a cease fire several times but each time firing resumed from within the bedrooms. (PX DG-12, 449).

After firing began, additional assistance was called for and arrived. (PX DG-12). While shooting was still going on in the apartment, guns and ammunition were collected to get them out of reach of any of the occupants of the apartment. (Tr. 34725, 26203-7, 26310-18, 26324, 33612-16, 33064-5).

c) Plaintiff Brenda Harris admits that as a member of the Black Panther Party she was taught how to fire weapons, including a carbine, shotgun and handguns.* (Tr. 17957). She was asleep in the living room when she was awakened by two knocks at the front door. She heard "Policemen, brothers, open up," which was the noise that awoke her. (Tr. 17788). She saw Plaintiffs Truelock and Bell standing in the living room and then run toward the rear of the apartment. (Tr. 17788-91). She then heard Clark say, "Just a minute" and thereafter there was a crash at the front door (door #2). (Tr. 17791).

Brenda Harris then saw the front door of the living room open and men coming in with flashlights. Harris said after the men came through the door (door #3), they started shooting. (Tr. 17803).

Mark Clark was in the northwest part of the living room behind the open front door (Tr. 17809), when she saw Davis flash a light in Clark's direction and shoot. (Tr. 17808). Officer Gorman, who had come into the living room, stood in front of her with a submachinegun and fired through the south wall over her, careful not to hit her. (Tr. 17814-5).

Harris admitted that she gave her lawyer a statement in December of 1969, agreed that she told him at that time what happened on December 4, 1969 and it was the truth. (Tr. 18026-8). In that statement, Harris admits she heard the police knock at the front door and twice say, "Policemen, brothers, open up," again knock on the door and then come through the front door of the apart-

* Miss Harris confirmed that Spurgeon Winters, who murdered Officers Gilhooly and Rappaport on November 13, 1969, gave weapons training for the Party, (Tr. 17960), and that he was a Party member on November 13 when he was killed. (Tr. 17962).

ment at which time she grabbed a pump* shotgun (Tr. 18141, 18147), which was loaded (Tr. 18217), and was trying to find the safety on her gun. (Tr. 18136-7). Simultaneously, Mark Clark got up and picked up a shotgun. (Tr. 17138).

She also admitted that when she went to bed on December 3rd, there were guns in the living room where she slept. Brenda Harris' statement was admitted into evidence as Defendants' Exhibits 184 and 185.

d) Defendant Officer Jones, after Davis and Gorman entered, came into the living room as Groth was telling Hughes to put in a 10-1 emergency call for help on the car radio. (DX DG-12). Jones immediately gathered some weapons that were in the living room and handed them to Groth who carried them out of the apartment to Hughes. (Tr. 34716-25). When Jones saw firing from the north bedroom, he fired his shotgun into the north bedroom. (Tr. 34427, 34446, 34850, 34430).

When Anderson was brought out of the apartment by the police he didn't see the hole in the hallway of the apartment (Tr. 15304), which the Plaintiffs' attorneys speculate was made by a shot from the weapon of Defendant Officer Jones as Jones entered the premises. There was no evidence from anyone, including Plaintiffs' expert Zimmers, that Jones fired his shotgun or any other firearm in the hallway as he entered the premises, or that the hold was created in the incident.

e) Defendant Police Officer Joseph Gorman entered the living room, grabbed the shotgun from Brenda Harris, who was sitting on the bed, and threw it across

* This is the type of shotgun which Defendant Officer Gorman said he grabbed from her hands as he stood in front of her after he entered the living room and while she was on the bed. (Tr. 33060-3).

the room out of her reach. He then kicked over the hassock in front of her bed, which had handguns on it, to prevent her from reaching for one. (Tr. 33063-5, PX 449). Several weapons were recovered from the living room, including Mark Clark's shotgun from under his body. (Tr. 33064-5). This weapon, a .12 gauge shotgun (DX 63), fired the rifled deer slug from within the apartment, according to Plaintiffs' firearms expert. (Tr. 19673-5).

2) *The South Bedroom and Back Door.*

a) Before Plaintiff Harold Bell went to sleep on a mattress in the living room, there were weapons there and he may have cleaned one. (Tr. 14072, 14106-7). He was awakened by noises and shouts. (Tr. 14113). The lights were *out* in the living room. (Tr. 14110). Bell ran to the rear of the apartment to the south bedroom. (Tr. 14114). He crouched next to the closet wall to conceal himself. (Tr. 14122-3). He came out of the south bedroom when ordered to do so by the police and consequently he was not wounded. As Bell left the premises under arrest, he saw Clark's body on the living room floor behind the entrance door, #3. (Tr. 14173-4).

Plaintiffs—not Defendants—offered as substantive evidence during direct examination of Plaintiff Harold Bell a statement (PX 142) which he gave his lawyer, Francis Andrew, in December 1969. In it Bell admits that he was awakened by loud noises, that he knew it was the police who were at the apartment, that someone in the apartment did get up and go to the door. (Tr. 14187). It was Clark. (Tr. 14203). Bell admits grabbing a shotgun that was in the south bedroom. (Tr. 14205). The top half of the first page of Brenda Harris' statement to Francis Andrew (DX 184, 185, 186 *Id.*, Tr. 7986), expressly states that it is the ending of Bell's statement.

There, at lines 2-7 from the top, Bell said that he thinks Plaintiff *Satchel was shooting at the police.*

b) Plaintiff Louis Truelock, like Hampton, had his last felony conviction within five years* of December 4, 1969, stayed at the apartment the evening of December 3, 1969. (Tr. 15643). He looked through all the rooms that night and saw a .45 caliber pistol near Hampton's bed in the south bedroom, a shotgun in the dining room, two shotguns in the north bedroom, and a shotgun and handguns in the living room. (Tr. 15918-21). There was a sawed-off shotgun in the living room. (Tr. 15921). He said that on December 4, 1969, Clark, Bell and Harris were in the living room with him. Clark was seated in a chair behind the entrance doorway, reading a book. Harris and Bell were asleep. (Tr. 15646-50). Truelock heard voices outside on the porch. There was a knock on the outer door of the apartment. He and Clark went to the window to see who it was.** (Tr. 15653).

He ran down the hallway into the south bedroom during which time the kitchen door, (the back door of the apartment), was opened. (Tr. 15655). He shook Hampton, who was lying on the bed with Deborah Johnson and told him that "Pigs are vamping." (Tr. 15657). He crawled into their bed with them (Tr. 15658), and

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* It is unlawful in Illinois to give a firearm to a person convicted of a felony within five years, or for a person convicted of a felony within five years to possess firearms or firearms ammunition. Ill. Rev. Stat. 1969, Ch. 38, §§ 24-3(d) and 24-3.1(3).

** When Truelock went to this window, he admitted that the drape over the window was open and that there was no damage whatever to the west front window of the living room. (Tr. 16002). There was a hole in the upper part of that window after the shooting was over. (Tr. 18837-38). The hole in the window was in a northwesterly direction from where Brenda Harris sat in the room with her loaded shotgun—the direction from which the police entered.

observed Harold Bell in the room standing between two shotguns in the south bedroom. (Tr. 15914). There was also a .45 caliber pistol in the south bedroom next to the bed. (Tr. 15917). Truelock believes that it was his duty to protect Hampton on December 4, 1969, by every possible means, including the use of weapons, if necessary. (Tr. 16219).

Hampton was lying on *his* back on the bed (Tr. 15785), according to Truelock, and he never moved from the position as shown on PX LT-2, a photograph. (Tr. 15871).

Truelock gave a statement to Plaintiffs' attorney, Donald Stang, in December 1969. The statement was under oath, witnessed by two persons and signed by Truelock in January 1970. (Tr. 15937-8). In that statement he told Stang that *he, Truelock, fired two shots at the police* out the back door of the apartment as he was running down the hallway. A diagram was and is attached to the Truelock statement, and it traces the path of *his bullets down the hallway, out the east door* of the dining room and out the back door. (PX LT-5, DX 157).* This corroborates Defendant Carmody's testimony that he was fired at as he broke through the back door. (Tr. 26182-7, 26190).

In the statement he gave to Stang, he stated that Hampton said to him, *"Get in bed with Deborah and I and put her in between us."* (PX LT-5, p. 7). So, according to Truelock, Hampton was *awake and conscious of* his surroundings after the police entered the apartment.

* Plaintiff Anderson said the east door between the dining room and kitchen may have been open during the shooting to the point as shown in PX BA-1 (Tr. 15302), and that the muzzle of a gun could fit in the opening. (Tr. 15578). Johnson testified at the criminal trial of certain State Defendants, which resulted in their acquittal, like Truelock (Tr. 15927), at that trial, that she observed the east door of the dining room was open when she walked toward the rear bedroom on the night of December 3-4 before she went to bed. (Tr. 17189).

c) Plaintiff Deborah Johnson knew that Hampton advocated an armed revolution for the United States. She, likewise, felt that was necessary and advocated it (Tr. 16917), and at that time she was a revolutionary. (Tr. 16829). She was taught to and did fire a weapon while a member of the Party. (Tr. 16923).

Johnson was in the apartment almost every day before December 4 and cleaned it. (Tr. 16674). When she cleaned it prior to December 4 she did not observe any holes in the living room or in the bathroom. (Tr. 16741). After the incident, there was a hole in the north wall of the bathroom over the tub (DX 167, Tr. 17329), and a hole high in the wall of the northwest corner of the living room. (Tr. 18828-34).

Johnson admitted that she had a .12 gauge shotgun at the apartment and it was customary to keep such loaded shotguns in the south bedroom where she slept with Fred Hampton, and that there was also a .45 automatic weapon on the table at the end of the Hampton bed in that room. (Tr. 16664-6).

She identified Defendants' Exhibit 72, which was seized by the police at the apartment, as her shotgun. (Tr. 16743-6). She admits that she never registered the shotgun with the City of Chicago. (Tr. 16748). She was able to point out several of the weapons seized by the police as being in the apartment prior to December 4. (Tr. 16664-70). Shotguns were also customarily kept in the living room on the mattress and in the cabinet. (Tr. 16816).

Newspaper clippings concerning the killing of Chicago Police Officers Gilhooly and Rappaport by Black Panthers on November 13, 1969, in Chicago were hung on the wall in the living room (DX DS-20), and were there on the morning of December 4. (Tr. 16576). They were hung there, she testified at the criminal trial in 1972, because "those were events surrounding the death of a Panther that we knew." (Tr. 16761). That news article referred to the shootout between the police and Spurgeon "Jake" Winters, whom she knew.

She said that Truelock was appointed to stay awake for the morning of December 4th for guard duty (Tr. 16847), and Clark was "supposed to stay awake also." (Tr. 16848). She assumed Hampton had been shot at the time he put his head down. (Tr. 16874). The revolver kept on the table at the end of the bed could be reached without getting out of bed by a person lying on the bed. (Tr. 16882).

When Johnson and Hampton went to bed at approximately 1:30 A.M., Hampton slept on the southern half of the mattress and she on the northern half (next to the wall). (Tr. 16409-14). According to her, he was lying on his stomach while he slept. (Tr. 16416). When she awoke, Louis Truelock was kneeling crouched at the head of the bed saying, "Chairman, wake up, the pigs are vamping" (Tr. 16417), as he shook Hampton. She crossed over his body and then Hampton raised his head facing the doorway, then Hampton laid his head back down and turned his head to the north. (Tr. 16420-1). Hampton's eyes were open. (Tr. 16421). Truelock was sitting at the head of the bed near the wall (Tr. 16424), (right where all the bullets were coming through the wall).

d) Defendant Carmody, while outside in the rear heard someone inside say "Who's there?" or "Who is it?" He then entered the kitchen doorway after he heard the sound of a gunshot being fired from inside the apartment. While in the doorway about to enter the kitchen, he saw a hand and a gun being fired at him from what he thought was the rear bedroom. (Tr. 26182-7, 26190). In fact, it was later identified as structurally consistent with a dining room and Carmody identified it by its usage because beds and a closet were in that room. (Tr. 26189). Because of the firing, he stepped back for a moment, then dove into the kitchen landing on his stomach in the middle of the room firing his service revolver in the direction of the gun which he had seen previously. (Tr. 26226-8). Officers Broderick and Ciszewski followed Carmody into the kitchen. Broderick fired from the kitchen also in a northeasterly direction. (Tr. 26228-34, 34094-9).

After Carmody heard a call for cease fire, another shot was fired in his direction while he lay on his stomach. Carmody then got up, leaped over a door, which had been placed as a barricade straddling the west entrance between the dining room and kitchen, and fired in the direction of what he later learned to be the south bedroom from which the previous shots had emanated. (Tr. 26240-3, 26247-53). Bell then came out of the south bedroom and surrendered. (Tr. 26255-6). Then a voice from the north bedroom yelled "Shoot it out" (Tr. 26283), followed by a bright flash and the report of a gunshot from the north bedroom doorway (Tr. 26258-9), to which he responded with a shot in the direction of that doorway. (Tr. 26262).

Johnson and Truelock, neither of whom was wounded, then surrendered from the south bedroom (Tr. 26286-7),

and Carmody entered that bedroom where he observed Fred Hampton lying on the bed. Carmody dragged him a few feet by his left wrist to the floor in the southeast corner of the dining room. (Tr. 26296, 26287-96). Hampton was bleeding and mortally wounded.

Carmody threw a shotgun out of the room which he saw near Hampton as well as a .45 caliber handgun near Hampton's hands. (DX 69, Tr. 26304-6, 26308-10, 26313, 26316-8, 26324). Officer Ciszewski about this time had entered the south bedroom and was shot by a bullet through the north wall of the south bedroom striking him near the ankle. (Tr. 26325).

e) Defendant Broderick was assigned to the rear of the apartment and followed Carmody and Ciszewski in after hearing gunshots. Broderick fired his .12 gauge shotgun from three locations. The first was from the kitchen when he fired high in a northeasterly direction approximately striking a point a foot below the ceiling, after he observed and heard sounds of guns and flashes from the north bedroom. (Tr. 34098-100). After Carmody jumped over the barricade and fired, Broderick then jumped over the barricade and noticed weapons against the south wall of the south bedroom and fired from the second location, the dining room, straight east in order to keep the people in the bedroom away from the weapons. (Tr. 34100-01). From the flashes and noise Broderick could tell that Ciszewski was shot from the north bedroom. Broderick then fired toward the north bedroom to force the Plaintiffs in the north bedroom to go between the beds. (Tr. 34101-3).

f) Defendant Ciszewski approached the rear of the premises with the other officers. While outside he heard gunshots. He then entered the kitchen door. (Tr.

33546-7). A cease fire was called and during it Bell came out of the south bedroom, holding hands high, and surrendered. He was turned over to the custody of other officers in the kitchen. (Tr. 33565-6).

After Bell was in custody, Ciszewski went back into the dining room area, heard a shot and saw a flash in the south bedroom. (Tr. 33566-70). Ciszewski then fired three times in an easterly direction through the open doorway of the south bedroom, two shots high and one shot low in the general direction of the east wall. (Tr. 33570-2). Johnson and Truelock then surrendered and came out of the south bedroom unharmed, and then Carmody went into the room and pulled out Fred Hampton. (Tr. 33585-81, 33595). Ciszewski went into the south bedroom and started to pick up guns located in the bedroom when he was shot. (Tr. 33612-16). Ciszewski did not see who shot him. (Tr. 33618).

Ciszewski unloaded the .45 caliber automatic pistol found in the south bedroom under Hampton's hand, which had *one live round in the chamber*, which he ejected, and four live rounds found in the clip in the gun. (Tr. 33690-1).

3) *The North Bedroom.*

The North bedroom was between the living room and the south bedroom. The one door into the room led to the hallway at the west end of the room. Just inside the room and to the south of the doorway was a doorless closet. Two twin size beds with heads against the south wall of the room were separated by a space in which was placed a chest of drawers. There was a large almost full length mirror propped up against the east wall of the room facing the doorway at the opposite end of the room. (Tr. 12127-8). Paint cans were stored in the closet at the west end of the room. (Tr. 15316, DX 150).

Three of the Plaintiffs, Anderson, Brewer and Satchel, slept in that room on December 3-4. This is what they said:

a) Plaintiff Ronald Satchel, a Black Panther, described himself as a revolutionary, both in 1969 and at the time he testified in 1976. (Tr. 12695). He believed then, and when he testified, in the terrorist slogan that "political power comes from the barrel of a gun." (Tr. 12706). On Plaintiff's own examination, Plaintiffs purposely brought out Satchel had two misdemeanor convictions and had been arrested several times in 1969 for unlawful use of weapons. (Tr. 13961-2).

He admitted that he had been preparing for a raid at the apartment (Tr. 12683), and that he may have heard Hampton say, "If any pigs kick our doors down, we'll blow their heads off." (Tr. 12623).

The Panthers kept many guns, machetes and knives at their headquarters at 2350 West Madison Street (a block from the apartment) and members were to acquire weapons. (Tr. 12631, 12701). All were required by Party rule to know how to use and service weapons. (Tr. 12672). He received weapons training as a Panther. (Tr. 13739). Satchel saw and handled the weapons kept at the apartment prior to December 4. (Tr. 12635-8). He had handled some of the guns which the police recovered at the apartment during the search. (Tr. 12947). Guns were stored all over the apartment, as well as ammunition, hidden behind beds and furniture, behind doors, under mattresses and in drawers. (Tr. 12670-1, 12957). Shotguns were customarily kept in Hampton's bedroom. (Tr. 16664-6).

Satchel admits that he never registered any of the weapons as required under City of Chicago Ordinance, and had never heard of any of the Plaintiffs registering

any. (Tr. 13494). He concedes that the large bullet hole, caused by a deer slug being fired by a shotgun, in the living room door was matched ballistically with Mark Clark's weapon. (Tr. 13951).

Satchel slept in the west bed in the north bedroom. (Tr. 12103). He was awakened by knocking, which he testified he assumed was the police at the apartment (Tr. 13027), and then gunshots from the front of the apartment. (Tr. 12132).

Satchel says he got on the floor between the beds, along with Plaintiffs Blair Anderson and Verlina Brewer who had been in the bed next to him. (Tr. 12141-2). There was gunfire and then a pause during which he heard a voice say to come out of the room; gunfire resumed and then there was another pause during which a voice again called for everyone to come out. (Tr. 12148). He admits that neither he nor Anderson nor Brewer responded during those pauses by either saying that they were going to come out or by actually coming out. (Tr. 13047-9). And, furthermore, he testified that *nothing prevented him from telling the officers he would come out.* (Tr. 13076).

The bedroom was dark until after the shooting was over. (Tr. 13051). The shooting resumed after the second pause and then he was shot. *Satchel testified that he couldn't say positively that no one in the north bedroom shot a gun.* (Tr. 13056). He, himself, didn't surrender until after he was shot. (Tr. 13049).

Satchel said he was lying on his abdomen or right side on the floor—feet towards south, head towards north—between the beds facing the west and was shot by bullets coming through the north wall. The bullets entered the front of his body on the right side about three inches from the floor and exited the back of his

body in a direct line. (Tr. 13113). There were no bullet holes in the north wall of the north bedroom at the level of the shots which entered his body or at any level below six inches. (PX 143). There were no bullet holes in that wall close enough to the floor to account for his wounds. (PX 143). After the gunfire, Satchel smelled paint which he hadn't smelled when he awoke. (Tr. 12151-2).

b) Plaintiff Brewer said she was never at the apartment when guns were *not* present, and she received training in how to break down a weapon from Satchel. (Tr. 14674-6). There were always weapons all around the apartment (Tr. 14689), and she had previously seen them in the living room, south bedroom, north bedroom and dining room. (Tr. 14693). A shotgun was customarily propped against the wall in the south bedroom (Tr. 14694), (the bedroom occupied by Hampton). Prior to December 4, 1969, she did not see any bullet holes in the living room (Tr. 14807); she saw no holes in the living room windows before she went to bed. (Tr. 14330).

Brewer said at least one person was to be awake at the apartment for security purposes during the night and that on December 4, 1969, that person was Mark Clark. (Tr. 14711). Clark kept a long gun for security duty. (Tr. 14718). This gun was kept next to him and was loaded. (Tr. 14802). The weapon attributed to Clark's shot through the living room door (door #3) with a rifled deer slug load was a .12 gauge shotgun. (Tr. 19673-5, DX 63), according to Zimmers, the firearms expert called by Plaintiffs.

Brewer went to sleep in the east bed in the north bedroom. She was awakened by Satchel telling her that the police were there and to get on the floor. (Tr. 14448). She said that she was lying on the floor on her stomach between the beds with Plaintiffs Anderson and Stachel

with her head towards the south and feet north. (Tr. 14450). Her wound was caused by a bullet entering her left buttock and exiting her right buttock. (PX DW-6B) (the medical drawing).

The direction of shots through the north wall of the bedroom (north to south) is perpendicular to the trajectory of the wound in the position Brewer claims she was in—a physical impossibility!

There was a pause in the firing when someone yelled, "cease fire". (Tr. 14824). She heard the police say "Come on out" and "Halt fire". (Tr. 14756). That pause was for about 10 seconds and during that period of time she did not come out or call out "We are coming out." (Tr. 14827).

c) Plaintiff Anderson said three or four shotguns and three or four pistols were customarily kept in the living room when he stayed at the apartment prior to December 4. (Tr. 15284). He had seen Hampton with the .45 caliber automatic pistol in his hands and it was Hampton's weapon. (Tr. 15277). He and the Panthers had been expecting a raid all the time, and he knew at the beginning that it was the police who were entering the apartment.

Before he went to bed, Anderson was in the living room where Brenda Harris was cleaning a shotgun, with Bell helping her clean the weapon. (Tr. 15326). When he went to bed around 2:00 A.M., he brought with him into the north bedroom the gray .12 gauge stolen police riot shotgun, (DX 84), a .38 caliber revolver, (DX 76), and a box of ammunition—.12 gauge deer slugs and .00 buck. (Tr. 14949). He previously loaded this shotgun alternately with deer slugs and .00 buck. This weapon has a gray barrel unlike most shotguns and along its line of

sighting closest to the shooter's eye is stamped "Chicago Police Department". He also loaded the pistol before going to bed. (Tr. 14954). Those two loaded weapons were placed by him, he testified, between the beds in the north bedroom. (Tr. 14958).

Anderson was awakened by voices and running. He heard Satchel say "The pigs are vamping." (Tr. 14965). Anderson got on the floor between the beds with Brewer and while lying there he was looking for the guns that he had put between the beds (Tr. 14969), before he went to sleep *but he couldn't find them, he said, because of the shooting through the walls. However, he said he would have used them if he had found them.* (Tr. 15329). He admits that the purpose of having the guns was to kill policemen, if necessary (Tr. 15371), *and that it was the shooting through the walls that prevented him from finding those guns.* (Tr. 15373).

Anderson heard the police order him and the others to come out but he didn't say anything. There was a pause (cease fire) in the firing for 15 or 20 seconds. (Tr. 15085-100, PX BA-7). There were two pauses in the firing. During these 15 or 20 seconds he could have told the police "We're coming out" but he did not; that was said only after he had been shot. (Tr. 15372). There was shooting through the walls thereafter, and then it stopped for "a few minutes". (Tr. 14972). During the cessation of firing (a few minutes) someone shouted, "Come out with your hands up" (Tr. 14975). He admitted that there were three calls to cease fire and that he never responded to those calls from the police. (Tr. 15291). Neither did Satchel nor Brewer. However, he did yell that they were coming out only after he was shot. (Tr. 15292). He then came out. After he surrendered, no one shot him. (Tr. 15597).

He said that the paint cans were near his feet. (Tr. 15316). However, the paint cans were actually in the closet and had been punctured by gunshots. (Tr. 33098-103, 33431). Although he claimed that he never moved from between the beds during the time when shooting was going on and that he was in between the beds when he was shot, nonetheless these paint cans which were in the closet were the source of the paint (DX 150, a photograph) (Tr. 15316); and he had paint on his feet, legs and hip when he exited the north bedroom. (Tr. 15523). So he was at the bedroom doorway in a good position to fire at the police.

Anderson gave a statement to his lawyer in December 1969 which was introduced by the *Plaintiffs* at trial as substantive evidence. (PX BA-7). In that statement he said that *he grabbed the riot shotgun*, he *handed it to Satchel*, who had jumped up on the bed, *and then he thought he heard Satchel shooting.* (Tr. 15085-100). *Anderson further admitted* that he stated at the "People's Inquest" (a rump Panther mock of the official inquest) that a second after he got up "*He started shooting all through the walls . . .* ". (Tr. 15310). The grammatical antecedent of "he" in the statement is Plaintiff Satchel.

d) Gorman fired his submachinegun while it was on single shot through the south wall of the living room in the direction of the north bedroom because he heard and observed gunshots from there. (Tr. 33073-86, 33088-9, 33255). Thereafter, he moved to the north bedroom doorway and fired in an easterly direction into that room. (Tr. 33097-8). While standing in the doorway he saw Anderson coming up from between the beds with a shotgun in his hands turning it in his direction. Gorman fired at him. He also saw Verlina Brewer coming up between the beds with an object in her hands. (Tr.

33098-33104, 33431). Two shotguns and a pistol were recovered from the north bedroom by the officers. (Tr. 33120-3).

Anderson was wounded in the thigh and groin—both entry wounds at the front or side. (Tr. 15019-21). His wounds show that he was shot by a bullet entering the side of his body travelling to the left at hip level. (PX DW-8, medical drawing). This corroborates Gorman's testimony that he shot Anderson as Anderson was coming up from between the beds with a shotgun in his hands turning toward Gorman who was standing at the doorway of the north bedroom. (Tr. 33098-103, 33431).

There was a bullet hole in the magazine of the stolen police riot shotgun (DX 84), the shotgun Officer Gorman observed in Anderson's hand when he shot at Anderson. Anderson admitted that that hole was not in the weapon before he went to bed. (Tr. 15502, 15271). A .45 caliber slug identified to Officer Gorman's weapon was recovered from the magazine of Anderson's weapon (PX RZ-90).

Gorman testified that after the shooting was over he observed a sawed-off shotgun between the beds in the north bedroom about where Satchel got up. That shotgun seized at the apartment had been sawed-off to an illegal length. It has studs driven into the undercarriage and is easily recognizable. (DX 79, Tr. 33120-3). Anderson admitted that that weapon *may have been* in the north bedroom that night. (Tr. 15536). Anderson also testified that the stolen police riot shotgun (DX 84), was in the apartment on December 2. (Tr. 15418). This testimony corroborates the information used for the search warrant.

Carmody fired in the direction of the north bedroom from the dining room after observing flashes and hearing gunshot reports from there. (Tr. 26258-9, 26262).

Officer Broderick testified that he fired high into the wall from the kitchen through the dining room toward the north bedroom when he observed shots and flashes from there. Next, he went through the dining room into the bathroom and fired into the north bedroom with his shotgun from the bathroom. (Tr. 34094-9).

After the persons in the north bedroom surrendered, there was no more firing of weapons in the apartment by anyone. All wounded plaintiffs were brought to the Hospital and the three occupants, not wounded, were brought to a police station for processing. (PX DG-12, Tr. 25965).

4) *The Weapons Recovered in the Search.*

Nineteen illegal weapons were recovered in the search of the premises by the police. None were registered to any of the Plaintiffs occupying the apartment under the City of Chicago Ordinance requiring that they be registered. (DX 276). One of the weapons, a .12 gauge police department riot shotgun, stolen from the Chicago police, was registered to the City of Chicago. (DX 84). The weapons were returned to the State's Attorney's office for inventorying, along with the other items which had been recovered, in accordance with the command of the search warrant which directed that the weapons be returned to the court. (DX 119).

V.

EVIDENCE OF FIRING BY THE PANTHERS AT THE POLICE

Respondents have tried to say that there was evidence of only one shot having been fired by the Panthers. This is wrong, all the police who fired their weapons testified to the contrary.

Apart from the testimony of those police, the following physical evidence (including impact points) and testimonial evidence of firing at the police is established by the record in this case:

1) Clark's shot through the living room door as Davis entered through it. (Tr. 13951).
2) Truelock's sworn statement to his lawyer contemporaneous to the incident (witnessed by two people) that he fired two shots at the police who entered the kitchen door. (PX LT-5, p. 23).
3) Plaintiffs' expert Zimmers' admission that he wrote in his notes that the shot pattern in the north wall of the north bedroom was caused by a shot from "inside the north bedroom". (Tr. 18937-66; 19021-3; 19106-37).
4) Anderson's statement to his lawyer that he thought Satchel was shooting from the north bedroom. (DX BA-7, pp. 10 and 19).
5) Bell's statement to his lawyer that he thought Satchel was shooting from the north bedroom. (DX 184, 186 *id.*) (top half of Plaintiff Harris' statement).
6) The hole in south door jamb of the living room doorway. This is the door Davis, Gorman, Jones and Groth came through. The hole is in the direction (west) from where the police came. (Tr. 18870-4; 17322; 20130-3; 20479).
7) The bullet hole in the dresser in the living room on west wall south of door, the trajectory of which was in the direction of the police. (Tr. 18875-87; 17347-9; PX 161, Tr. 20231).

8) The unobstructed fields of fire from inside the apartment to the outside:
   a) out the front doors from living room. (Tr. 17703; 17679-87; Allen-DX 131, 132, 133, 134, Tr. 11969-75).
   b) out front from north bedroom. (Tr. 17315; 17679-87; DX 131-134).
   c) out back from living room. (DX 131-134; Tr. 11969-75).
   d) out back from north bedroom. (DX 131-134).
   e) out back from dining room. (Tr. 20016; 20032, 20046; 20126; DX 131-134; Tr. 11969-75).
   f) out back from south bedroom. (DX 133-4; Tr. 17726; 11969-75).

Howard Allen, who testified for Plaintiff, is an architect hired by Plaintiffs to prepare a scale drawing of the layout of the interior of the apartment. (Tr. 11849). He conceded that there were clear lines of sight (fields of fire) from within the apartment to the outside of the apartment through the back and front doors. (DX 131, 132 and 133, Tr. 11969-75). These clear fields of vision include perspectives from the south wall of the living room and doorway of the north bedroom out the front door and from the north bedroom doorway, the dining room and the south bedroom out the back door. (DX 131, 132 and 133). He said that there is sufficient space in the field of fire out the front doors of the apartment to accommodate passage of 7,000 ¾ inch objects (the size of a rifle deer slug) simultaneously. (Tr. 10250).

Zimmers counted what he thought were bullet holes in walls, *not all marks and holes in the walls.* He didn't add

up the possible holes and impact marks that could be attributable to Panther firing at the police.*

VI.

EVENTS FOLLOWING THE SEARCH

A. Community Tension Generated By Panther Publicity.

Immediately after the police left, the Panthers and their representatives took possession of the apartment. Thousands in the following days went through the apartment on tours conducted by the Panthers who spread

* Additional evidence or marks that are consistent with Panthers shooting at police—all disputed by Plaintiffs—include:

1) The nine .32 caliber shell casings which could not be identified with any weapons recovered at the scene. (PX RZ-90, p. 3).
2) The hole in upper west window of living room's north wall opposite from where Plaintiff Brenda Harris was sitting. (RZ-15; Tr. 18837-46; 17364-8). (Prior to going to bed, Brewer said she saw no holes in the living room windows, Tr. 14330).
3) The hole in northwest corner of living room opposite and northwesterly of where Brenda Harris was on the bed. (Tr. 18828-34; 20317-21). (Prior to 12-4, Brewer said she did not see any holes in the living room, Tr. 14807).
4) The hole in the west wall of living room near the ceiling and west of and opposite Brenda Harris' position. (Tr. 17586; 17739-40; 17371; DX 180; PX DS 21; Tr. 17378; PX 143, p. 35). (When Johnson cleaned the apartment before December 4, 1969, she observed no holes in the living room, Tr. 16741).
5) The numerous holes and pock marks throughout the apartment. (Tr. 17390; 17409; 17423; 20054).
6) The numerous shells and fragments gathered by police, the FBI and the Panthers which could not be attributed to any weapons—Panthers or police. (See Defendants' cross-examination of Zimmers on Plaintiffs' offer of proof on Zimmers). (Tr. 20670-6).
7) The impact points in kitchen stove which Carmody observed. (Tr. 19405-6).

their version and made wild charges of murder by the police. (Tr. 16901-3). A constant barrage of publicity followed the event in all the media. Demonstrations, student class walkouts, along with the constant sensationalized publicity immediately following the incident, contributed to the development of community tensions. (Tr. 24541-3, 24811). Panthers and their representatives called news conferences. For example, Francis Andrew, the attorney for the Panthers, held a news conference reciting erroneous information following the autopsy conducted by Dr. Victor Levine, which Dr. Levine attended at Mr. Andrew's request. (Tr. 22189-90). At trial Levine admitted making serious errors in his autopsy findings. (Tr. 20719-20).

B. The TV Re-Enactment And Tribune Exclusive.

To respond to sensationalized charges of murder made against the police and Hanrahan generated by the Panthers and the media, Defendant Hanrahan told his men to appear for an interview given exclusively to the Chicago Tribune on December 11, the day after Andrew's press conference. (Tr. 20128). The reason for the exclusive, Hanrahan testified, was for the purpose of getting a full unbiased, unedited account of what the police had done on December 4, in response to these charges. (Tr. 27472-4; 27480-1). A few days later Hanrahan told his men to appear on a TV broadcast, which was taped, to also demonstrate exactly what the police did in the apartment. Both were done, he said, to try to relieve tension in the community which he believed was his duty as the public prosecutor charged with the responsibility of law enforcement. (Tr. 24541-3, 27588, 27590). There was no evidence of editing done by any Defendant.

VII.

INTERNAL DISCIPLINARY PROCEEDING AT THE INTERNAL INVESTIGATIONS DIVISION OF THE CHICAGO POLICE DEPARTMENT

Several days after December 4, 1969, Hanrahan requested, *not* ordered, the City of Chicago Police Superintendent to investigate the conduct on December 4, 1969 at the apartment of these 14 City of Chicago police assigned to the Cook County State's Attorney's (Hanrahan's) office. (Tr. 27904). As part of the Police Department's investigation, Superintendent Conlisk* put in motion the internal police disciplinary procedure. Defendant Mulchrone, the Deputy Superintendent of the Department with supervisory authority over the Department's Internal Investigations Division, directed the proceedings. He ordered Defendant Capt. Ervanian to make his findings in a report to him which Mulchrone, as was the custom, would then read and recommend a course of action for the Superintendent. (Tr. 31368, Dep. 142). Defendant Sgt. Meade, Mulchrone's legal advisor and aide, contacted the attorneys for the Plaintiffs herein and asked them if the Plaintiffs would participate in the Internal Investigations Division proceeding by filing complaints. They refused.

Defendant Meade obtained Sgt. Groth's five page report on the incident which he had written immediately following the incident at the State Attorney's office. (PX DG-12). From that report Meade (prior to Groth's arrival at the IID), prepared questions and repeated Groth's answers, taken from his report, to the questions of what occurred at the apartment. (PX 453). Groth, when he arrived, reviewed the questions and answers

* Conlisk was dismissed out of the case before trial. *Hampton v. City of Chicago*, 484 F.2d 602 (7th Cir. 1973), *cert. den.* 415 U.S. 917.

and agreed under oath those answers were accurate for the questions posed at the IID. (Tr. 31368, Mulchrone Deposition, pp. 161-162). Statements were taken under oath from the fourteen police defendants who were asked if they agreed or disagreed with what Groth told the IID had happened and if they had anything further to add. (Tr. 24764-5, PX 453). There was in effect at this time an Illinois statute, limiting questioning of police, that provided that before any officer could be interrogated or examined by a ". . . *departmental agent or investigator the results of which hearing, interrogation or examination may be the basis for filing charges seeking his removal or discharge, he must be advised in writing as to what specific improper or illegal act he is alleged to have committed* . . ." Ill. Rev. Stat. 1969, Ch. 24, § 10-1-18.1. Plaintiffs failed to come forth to specify any alleged illegal or improper conduct, although asked to do so. No Plaintiff identified or mentioned Mulchrone, Meade, Ervanian or Kukowinski in their testimony, nor did they call them to testify in the trial. There was no evidence that Mulchrone, Meade, Ervanian or Kukowinski ever told any of the fourteen police officers how to testify, nor that they had anything to do with any subsequent proceeding, the Federal Defendants, the issuance of the search warrant or the December 4th incident or were in any position to prevent harm to the Plaintiffs.

Ervanian wrote up his recommendations to Mulchrone, who in turn recommended to the Superintendent that no disciplinary action be taken. The Superintendent had the option of formally charging the police, who would then be entitled to a Civil Service type board hearing, or suspending them for up to 30 days,* or find-

* Public employees facing temporary suspension for less then 30 days have, however, interests qualifying for protection

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ing no disciplinary action was warranted under Ill. Rev. Stat. 1969, Ch. 24, § 10-1-18.1. The Superintendent on December 16, 1969, made the determination that no disciplinary action was warranted for any of the fourteen police officers in regard to their conduct on December 4, 1969 at 2337 West Monroe.

VIII.

DEFENDANT JOHN SADUNAS

Sadunas as one of several firearms examiners in the Chicago Police Department crime laboratory was ordered to examine the ballistics items gathered at the apartment, as well as the guns which had been seized. The District Court directed a verdict in his favor at the close of Plaintiffs' case.

Sadunas was not called to testify at the trial. Plaintiffs' principal focus on John Sadunas was the fact that in December, 1969 he gave an opinion which identified two shotgun shells (hereinafter referred to sometimes as "N and O") as coming from a .12 gauge shotgun (Tr. 20397), which Gorman testified he grabbed from Harris on December 4, 1969. (PX 449, Tr. 33063). Plaintiffs' FBI expert, Zimmers, testified that he made a positive identification of those shells as having been fired by the Ciszewski shotgun. (Tr. 20337-42, 20383, 20424). Upon subsequent re-examination of the shells in early 1970, after Zimmers told him of the mistake, Sadunas agreed with Zimmers' conclusion (PX 50, p. 7), after he examined the shells.

footnote continued
under Due Process which requires that they be granted a hearing prior to suspension. *Muscare v. Quinn*, 520 F.2d 1212 (7th Cir. 1975), Petition for Writ of Certiorari dismissed as improvidently granted, per curiam. 425 U.S. 560 (1976).

A. No evidence was introduced showing the 1970 Cook County Grand Jury based its indictment of the Plaintiffs herein upon the Sadunas report as opposed to the testimony of numerous witnesses which included Dr. Victor Levine, the Panthers' pathologist, Herbert McDonnell, a criminalistics' expert employed by the Panthers, and Francis Andrew, a Panthers' attorney. 71 CR 1791.

B. Plaintiffs did not offer any testimony or evidence to show that *anyone* pressured Sadunas into misidentification of "N and O". On the contrary, Sadunas testified before a Federal Grand Jury that nobody made any suggestions to him with respect to his test conclusions, and the pressure on him was to give whatever the conclusions were, and nobody pressured him to find one way or another. (PX 427, FGJ 127).

C. No witness testified during the trial about Sadunas' conduct except Robert Zimmers. To the best of Zimmers' knowledge (when this recognized authority was asked about Sadunas' reputation) Zimmers said he knew ". . . nothing to indicate that it was other than honorable" in the field of firearms and toolmarks identification. (Tr. 20257). Zimmers considered that he, himself, had a good reputation, and that his reputation and Sadunas' are "somewhat similar." (Tr. 20258).

Zimmers found nothing in Sadunas' mistaken identification *which would make it appear to be a deliberate misidentification*:

> "Q. Now, Mr. Zimmers, in your examination of the materials gathered by the Chicago Police Department in its crime lab, and the examination of Mr. Sadunas of these materials, did you find any evidence in Mr. Sadunas' examination which would indicate that he deliberately misidentified N and O?"

"A. Not deliberately, no. I wouldn't say that I did." (Tr. 20258).

When Zimmers test fired the Brenda Harris shotgun and compared the shells with "N and O" which Sadunas had misidentified with the Harris shotgun, Zimmers said it is possible to fire a weapon twice in immediate succession and get ballistics dissimilarities. (Tr. 20330). Zimmers also admitted that he *never examined* Sadunas' test comparisons. (Tr. 20330).

D. On April 28, 1970, Sadunas issued a report entitled "Final Report". (PX RZ-93). It sets forth "the findings of the Examiner based on the examination and the evaluations of all the evidence that was involved in the incident at 2337 West Monroe." (*Id.*, page 1). The report adds that additional evidence items had been submitted in the interim, including the guns carried by the police on the search, which had finally been returned to the Chicago Police Crime Lab by the FBI. (PX RZ-93).

The report further states that the "first opportunity the examiner had to examine all of the evidence in its entirety was on 4 March 1970", which was after their return from the FBI in Washington. The police weapons had been test fired but since all the questioned evidence was in the FBI Laboratory, comparison could not be conducted. The initial report was based upon the comparison of the weapons recovered at the scene which had been submitted by police.

During the re-examination of all the evidence, similarities were observed between shot shells (N and O) 69/13165/F and the test shot shells of FO/719 (High Standard Shotgun, Model K 1200). Under the circumstances, it was deemed necessary to obtain additional "test firing" from weapons 9F/10139, SF 10269 and FO/719 (*id.*, p. 6) (other guns carried by police).

In this Final Report of April 28, 1970, it was Sadunas' opinion that "shot shells (N and O) 69/13165/F were fired in FO/719, State's Attorney's police gun." (*Id.*, p. 7). This opinion contained in Sadunas' fourth and final report after the re-examination and testing of all the guns was a change of Sadunas' opinion contained in his first report of December 16, 1969.

So Sadunas made a mistake and when it was pointed out to him, he corrected it after he made his re-examination.

IX.

OTHER OFFICIAL PROCEEDINGS

Following the December 4, 1969 incident there were a number of official proceedings, including the hearing of a complaint before the Chicago Bar Association based on the publicity of the TV reenactment against Hanrahan for disciplinary censure as a licensed attorney which was dismissed in his favor.

All State Defendants testified at one or more of the following proceedings:

a) The January Special Blue Ribbon Coroner's Inquest called by the Cook County Coroner, Dr. Toman.

b) The January Cook County Grand Jury which indicted Plaintiffs in late January 1970. The indictments were later dismissed on motion of Hanrahan.

c) A special Federal Grand Jury convened in December and terminated in May, 1970 without returning any indictments.

d) A Special Cook County Grand Jury convened in December 1970 which returned indictments against several State Defendants for conspiracy to obstruct justice, but voted no bills on all other

written draft indictments proffered against State Defendants for crimes of violence, including murder, armed violence, etc. 70 S.G.J. 3.

e) The sixteen week trial of said State Defendants for conspiracy to obstruct justice. On October 25, 1972, all of the Defendants were found not guilty in the Illinois State Criminal Court. 71 CR 1791. The case was tried and the Special Grand Jury was conducted by a Special Prosecutor and his staff.

REASONS FOR GRANTING THE WRIT

This case presents to this Court for resolution urgently important—constitutional and practical—questions for the future guidance of law enforcement officials throughout the nation, as well as the rights of the instant litigants, by reviewing the conduct of Federal and local law enforcement officials in combatting illegal acts of a group who have employed terrorist tactics, including violence, to achieve their ends.

I.

THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION AFFORDING ABSOLUTE IMMUNITY FOR ADJUDICATIVE FUNCTIONS.

The Chicago Police Department in 1969 had an Internal Investigations Division (IID) the function of which under written procedures was to investigate and discipline police personnel. These procedures were consistent with the American Bar Association's Standards Relating to the Administration of Criminal Justice (Section 5.4 Urban Police Functions) which recommend that ". . . internal reviewing procedures . . . [for] . . . monitoring, and reviewing citizen complaints . . . [conforming] . . . procedures to administrative due process requirements . . ." be established by police departments.

The proceedings before the IID were administrative and quasi-judicial in nature. Defendants Mulchrone, Ervanian, Kukowinski and Meade were the police assigned in the instant case,* to conduct these internal dis-

* After disciplinary hearing and recommendations to the Superintendent of Police by them, policemen could be

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ciplinary procedures and to review citizen complaints. The Plaintiffs, or their families, however, although requested to do so by Meade refused to come forward and make complaints against the fourteen policemen.

The Court below (A. 61) determined that the activities of three Assistant State's Attorneys who were present at the disciplinary hearing were absolutely immune under *Imbler v. Pachtman*, 424 U.S. 409 (1976), but determined only qualified immunity was applicable to these four IID personnel.

In *Butz v. Economou*, 438 U.S. 478, 516 (1978) this Court reversed the second circuit, which had held that only qualified immunity applied in an analogous setting, holding:

> "We believe that agency officials must make the decision to move forward with an administrative proceeding free from intimidation or harassment . . . we hold that those officials who are responsible for the decision to initiate or continue a proceeding subject to agency adjudication are entitled to absolute immunity from damages liability for their parts in that decision."

Butz was a case in which the agency administrators were sued for their pursuance of that Plaintiff. Here, these four men are sued for failing to recommend disciplinary action against 14 police officers, even though Plaintiffs refused to participate in the hearing and accuse.*

footnote continued
suspended up to 30 days, or charges could be preferred before the civilian Chicago Police Board for a longer suspension or discharge. Ill. Rev. Stat. 1969, Ch. 24, § 10-1-18.1, c.f. *Muscare v. Quinn*, 520 F.2d 1212 (7th Cir. 1975), *cert. denied*, 425 U.S. 560 (1976) upholding due process in disciplinary procedures against a Chicago fireman.

* In *Butz v. Economou*, 438 U.S. at page 515, this Court, citing *Imbler v. Pachtman*, 424 U.S. 478, considered such a

(Footnote continued on following page)

The continued function of internal police disciplinary procedures is important to every community in this country. If a civil action may be maintained against one charged with carrying out the disciplinary procedures by virtue of an allegation of malice, then one would lose "that independence without which no judiciary can either be respectable or useful." *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1872). Just as Justice White said in *Butz*, Petitioners here submit it is applicable to this case:

> "Because of the importance of immunity doctrine to both the vindication of constitutional guarantees and the effective functioning of government, we granted certiorari." 438 U.S. 478, 480.

This Court presently has before it the issue of immunity of members of a parole board, *Martinez v. California*, #78-1268, 48 L.W. 3321 (1979). The question of immunity of these Defendants is no less compelling.

II.

THE COURT BELOW ORDERED DISCLOSURE OF THE IDENTITY OF A CONFIDENTIAL INFORMANT AND FAILED TO FOLLOW THIS COURT'S DECISION IN *FRANKS v. DELAWARE*.

On December 3, 1969, a hearing was held before an Illinois state judge as to whether or not the search warrant should issue. Sgt. Groth's affidavit supporting the warrant's issuance set forth that a reliable informant had provided the information about illegal weapons. Groth's complaint for the warrant also stated Jalovec told Groth that Jalovec had a conversation with

footnote continued
claim unlikely, "While there is not likely to be anyone willing and legally able to seek damages from officials if they do *not* authorize the administrative proceeding, cf. *id.*, at 438 (White, J., concurring in judgment)". (sic)

a reliable informant who told him about the illegal weapons stored at the apartment. Groth alone attended this hearing and was questioned by the Judge.

The search warrant in question has never been held invalid. Two confidential informants supplied the information that formed the basis for the complaint for the warrant. Richard Jalovec, a prosecutor, received information from an FBI agent, Defendant Mitchell, that illegal firearms were located in the apartment. (Tr. 24395-8, 24403-6). Mitchell obtained his information from his paid informant William O'Neal, a Black Panther, who had *seen* the firearms in the apartment. There is no dispute that O'Neal was a reliable informant. Under Illinois law in 1969 (as well as today), there was no requirement that an affidavit disclose that more than one person furnish evidence as the basis for a search warrant. Ill. Rev. Stat., Ch. 38, § 108-3 (1969). The use of hearsay as the basis for issuance of a warrant is also permissible, *Jones v. United States*, 362 U.S. 108 (1964), which the Seventh Circuit itself has recognized in holding hearsay upon hearsay is not inherently defective. *United States v. Wilson*, 479 F.2d 936 (7th Cir. 1973).

In addition to O'Neal's seeing the weapons, Groth had his own informant who by telephone told him on December 2 that weapons and ammunition were stored at the premises and he had seen them (Tr. 25062-3, 25076-7, 25304), confirming there were sawed-off shotguns and corroborating the information Mitchell received from O'Neal. (DX 119, Tr. 25076-7, 25304). The identity of one confidential informant, Federal Defendant O'Neal, has been disclosed. O'Neal has assumed a new identity and is receiving the protection afforded by a federal witness protection statute.

Plaintiffs have stated that they ". . . are seeking to learn the identity of the informant in order to 'try and find' evidence of illegality." (A. 115). At the same time Plaintiffs question Groth's veracity in his affidavit supporting the warrant's issuance regarding the *existence* of his informant.

The Court below has ordered disclosure. In doing so, however, the Court ignored what this Court recently held:

> "There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. *To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross examine.* There must be allegations of deliberate falsehood or of reckless, disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. *Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained.* Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, *if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.* On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth Amendment, to his hearing. Whether he will prevail at that hearing is, of course, another issue." *Franks v. Delaware*, 438 U.S. 154, 171, 172 (1978) (Emphasis added).

The Court below also incorrectly concluded contrary to the clear record, that, "The trial judge never attempted to apply the *Roviaro* balancing test or to determine whether disclosure was essential to a fair determination of Plaintiffs' cause of action." (A. 65). The district court specifically considered it. It is understandable that in a case which had 38,000 pages of trial transcript, the Court below could have failed to find the argument, which was presented, briefed and argued before the trial. (Tr. p. 247 and particularly p. 16, February 28, 1975). (Memorandum of Law in Opposition to Plaintiffs' Motion to Compel Answers to Deposition Questions of Groth). Moreover, the Seventh Circuit refused to issue a Mandamus*, after full briefing by both sides, in response to Plaintiffs' petition to the Seventh Circuit which sought a ruling *before trial* that the District Judge abused its discretion in not compelling disclosure under *Roviaro v. United States*, 353 U.S. 53 (1957). Therefore the trial judge did apply *Roviaro*.

The Court below also ignored *Franks v. Delaware* and in the words of Judge Pell, "By this court deciding as a matter of law that the identity of the informer is not entitled to protection, we are deciding a factual matter in much the same way as that which the majority faults Judge Perry for doing." (Opinion, A. 116).

The Court decision below compelling disclosure of the search warrant confidential informant, is not only in conflict with *Franks v. Delaware*, and the decisions of *Metros v. United States District Court of Colorado*, 441 F.2d 313 (10th Cir. 1971) and *Black v. Sheraton Corp. of America*, 564 F.2d 550 (D.C. Cir. 1977), but fails to

* *Hampton v. Hanrahan*, No. 75-1391 (7th Cir. 1975) (unreported).

follow *Roviaro v. United States*, 353 U.S. 53 (1957). *Roviaro* was a criminal case in which this Court required disclosure *or* dropping the criminal charges after the party seeking disclosure made the following showing, none of which type have been made here: (a) that the informant took a material part in bringing about unlawful heroin possession; (b) that the informant was the *sole* participant with defendant in the transaction charged; (c) that the informant might be a key witness as to defendant's guilt or innocence; and (d) that the informant was the only witness in a position to amplify or contradict testimony of government witnesses. *Id.* 353 U.S. 64, 65.

III.

THE DECISION BELOW IS CONTRARY TO THE EXPRESS AND IMPLICIT RULING IN *IMBLER v. PACHTMAN* AND ITS PROGENY.

The Writ should be granted to determine the scope of prosecutorial immunity concerning acts done in preparing for and drafting the application to a court for a search warrant and necessary attendant acts performed, within the scope of a prosecutor's duties and prosecutorial capacity, to carry out the court order commanding the search.

Among the issues at stake here is that of absolute immunity. As the Court said in *Forsyth v. Kliendienst*, 599 F.2d 1203, 1209 (3rd Cir. 1979) ". . . the right which absolute immunity protects is the right not to be subjected to trial, it is irretrievably lost if appellate review must await final adjudication on the merits." This Court, we submit, would be warranted in granting certiorari for that reason alone.

There is a significant difference between the Third Circuit (*Forsyth, supra*) and the Court below, the Seventh Circuit. In the Third Circuit a *warrantless*, prosecutorial authorization of a search (telephone tap) was absolutely immunized. That Court reasoned that, "As Justice Powell recognized, a prosecutor's quasi-judicial activities are not limited to those which take place in the courtroom. The decision to initiate a criminal prosecution, which we believe includes some limited right to gather information necessary to make that decision, is one such protected function." *Id.* 1217.

In the Seventh Circuit, however, the court has held that prosecutors Hanrahan and Jalovec may be held liable and may only have the qualified immunity defense, where, being presented with information of possession of unlawful weapons, they drafted the application for the warrant and authorized its presentation to a judge. *After* a hearing, outside their presence, a judge then commanded the search by issuing a warrant.

Disallowing absolute immunity at the warrant stage hardly encourages conformance to the American Bar Association Standards Relating to Criminal Justice, which directs that ". . . prosecutors and judges carefully review application for warrants and use simplified procedures and otherwise provide easy access for impartial review of applications for warrants." (The Urban Police Function § 8.1(b)(ii).

In reaching a result contrary to the Court below, the Third Circuit, following *Imbler v. Pachtman*, 424 U.S. 409 (1976), held:

> "To grant a prosecuting attorney absolute immunity over his decision to initiate a prosecution while subjecting him to liability for securing the information necessary to make that decision would only foster uninformed decisionmaking and the

> potential for needless actions. We believe that the right to make the decision without being subject to suit must include some limited right to gather necessary information. At the same time, we are sensitive to the possibility that this narrow exception could be distorted to include all of a prosecutor's investigative activities. We hold only that to the extent that the securing of information is necessary to a prosecutor's decision to initiate a criminal prosecution, it is encompassed within the protected, quasi-judicial immunity afforded to the decision itself." *Forsyth v. Kliendienst*, 599 F.2d 1203, 1215 (3rd Cir. 1979).

IV.

THE DECISION OF THE COURT BELOW CONFLICTS WITH THIS COURT'S DECISION IN *YASELLI v. GOFF* AND DECISIONS OF OTHER CIRCUITS BECAUSE THE COURT BELOW ALLOWED THE USE OF PRIOR TESTIMONY OF A WITNESS AS SUBSTANTIVE EVIDENCE OF THAT WITNESS'S CONSPIRING TO VIOLATE OR TO DEPRIVE CONSTITUTIONAL RIGHTS.

Witnesses in a judicial proceeding are absolutely immune from civil liability for their testimony. In this Court's recent decision, *Butz v. Economou*, 438 U.S. 478, it reaffirmed its holding in *Yaselli v. Goff*, 12 F.2d 396 (2nd Cir. 1926), *aff'd* 275 U.S. 503, concerning common law immunities. In *Butz* this Court stated (at p. 509) that "The Court of Appeals in that case [*Yaselli*] discussed in detail the common law precedents extending absolute immunity to parties participating in the judicial process, judges, grand jurors, petit jurors, advocates and witnesses."

In reversing the directed verdicts the Court below used witnesses' prior testimony against such witnesses as substantive evidence of civil rights violations under 1983 *et seq.* One such example is that the Court below

found that ". . . it was the raiders' testimony which provided much of the basis for the indictments Hanrahan brought against the survivors." (A. 46). The Court used this as one of the bases for holding that a *prima facie* "post raid" conspiracy had been proved. Thus, the Court below has departed from the view of this Court as shown above, that a witness is immune from civil liability, and the common law immunity of a witness as set forth in *Yaselli*. Moreover, other circuits conflict with the Court below: *Blevins v. Ford*, 572 F.2d 1336, 1338 (9th Cir. 1978) follows *Brawer v. Horowitz*, 535 F.2d 830, 836 (3rd Cir. 1976) a holding that a witness had absolute immunity in § 1983 *et seq.* actions, accord: *Myers v. Bull*, 599 F.2d 863 (8th Cir. 1979); *Burke v. Miller*, 580 F.2d 108 (4th Cir. 1978); *Bennett v. Passic*, 545 F.2d 1260 1260 (10th Cir. 1976); *Bryant v. Commonwealth of Kentucky*, 490 F.2d 1273 (6th Cir. 1974).

V.

THE DECISION OF THE COURT BELOW CONFLICTS WITH THIS COURT'S DECISION AND THAT OF THE FIFTH AND TENTH CIRCUITS ON THE ISSUE OF LIABILITY OF A SUPERVISOR FOR THE ALLEGED CONSTITUTIONAL TORTS OF A SUBORDINATE UNDER 42 U.S.C. § 1983 *ET SEQ.*

The Court below found that a *prima facie* case had been made for liability against Hanrahan as State's Attorney, and Jalovec, as head of the Special Prosecutions Unit for acts of subordinates outside their presence, because of their supervisory capacity. This resulted in reversal of directed verdicts in their favor for non-conspiracy counts under § 1983, wrongful death, excessive force, assault and battery, denying rights under the First, Fourth, Fifth, Eighth, Ninth, Thirteenth and Fourteenth Amendments. In the Seventh Circuit supervisors can now be vicariously liable for acts of their

subordinates resulting in constitutional deprivations* without proof of acquiescence in the deprivational acts.

Neither Hanrahan nor Jalovec, who were prosecutors, were at the apartment, when the police arrived to serve the warrant. Hanrahan, as the elected Cook County State's Attorney, was the supervisor of all personnel in that office, including all attorneys, a Chief Investigator, Deputy Chief Investigator and all police assigned or attached to the office such as the police in this case.**

The Court below (at A. 43-44) states that supervisory personnel are proper party defendants to a section 1983 action relying on Judge Swygert's opinion in *Schnell v. City of Chicago*, 407 F.2d 1084 (7th Cir. 1969). *Schnell*

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* The Court below made no mention of resting supervisor's liability on a negligence theory since in *Bonner v. Coughlin*, 545 F.2d 565 (7th Cir. 1976) the Court *en banc* held that mere negligence does not state a claim under § 1983; however, in *Bonner* Judge Swygert, who wrote the opinion in the Court below, dissented saying, ". . . the distinction between negligence and intentional conduct in determining whether a section 1983 action can be brought is neither logical nor just." The District Court in the instant case allowed the plaintiffs over defendants' objection to try counts for negligent deprivation of constitutional rights (A. 6). *Procunier v. Navarette*, 434 U.S. 555, 566 (1978) precludes a cause of action based on state defendants alleged negligent deprivation of constitutional rights, holding: ". . . prison officers were charged with negligent and inadvertent interference with the mail and the supervisory personnel with negligent failure to provide proper training. To the extent that a malicious intent to harm is a ground for denying immunity, that consideration is clearly not implicated by the negligence claim now before us."

** Similarly, this Court has supervisory powers over the Supreme Court Marshal appointed by this Court ". . . and who shall be subject to removal by the Court." 28 U.S.C. § 672. In turn, "The Marshal of the Supreme Court . . . under the general supervision and direction of the Chief Justice may designate employees of the Supreme Court as special policemen." 40 U.S.C. § 13f

(". . . a suit for equitable relief only . . ." *id.* 1086) is no longer a leading authority since this Court decided *Rizzo v. Goode*, 423 U.S. 362 (1976) and *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

To sustain a complaint against the supervisor requires an ". . . affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners—express or otherwise—showing their authorization or approval of such misconduct." *Rizzo v. Goode*, 423 U.S. at 374 (1976). In following *Rizzo*, it has been held: "The 'affirmative link' requirement of *Rizzo* means to us that before a superior may be held for acts of a subordinate, the superior, expressly or otherwise, must have participated or acquiesced in the constitutional deprivations of which complaint is made." *Kite v. Kelley*, 546 F.2d 334, 337 (10th Cir. 1976).

There was no evidence of acquiescence by Hanrahan or Jalovec in constitutional deprivations. Indeed, the opinion cites as their actionable conduct, their approval of Sgt. Groth's (Groth was the officer who led the team serving the warrant) selection of early morning timing for service of the warrant and his selection of the men and the weapons carried on the search. None of these acts were constitutional deprivations, and Illinois law then and now provides that a search warrant may be served at any time of any day or night. Ill. Rev. Stat. 1969, Ch. 38, § 108-13.

The liability of a supervisor for acts of a subordinate so found by the Seventh Circuit amounts to respondeat superior contrary to this Court's holding in *Monell v. Department of Social Services*, 43 U.S. 658.

The Fifth Circuit has, we submit, correctly interpreted *Monell* as precluding a Sheriff from liability on a respondeat superior theory for the acts of his subordinate deputy for conducting a search with a warrant in which acts done during the search violated a person's constitutional rights. *Baskin v. Parker*, 602 F.2d 1205 (5th Cir. 1979).

VI.

THE COURT BELOW FAILED TO APPLY THE REQUIREMENT THAT TO ESTABLISH LIABILITY UNDER 42 U.S.C. § 1985(3), AN INVIDIOUSLY DISCRIMINATORY ANIMUS MUST BE PROVED AGAINST EACH PERSON SOUGHT TO BE HELD LIABLE THEREUNDER.

This Court has held that under § 1985(3) "Plaintiffs must show some racial or perhaps otherwise class based, invidiously discriminatory animus behind the conspirators' action." *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). The District Court directed verdicts in favor of all Defendants on all conspiracy issues because there was no such showing.

It has been the contention of the Plaintiffs that the "class" of the " 'class' based invidiously discriminatory animus", was at the time of the incident, the Black Panther Party. It, of course, was not supplied by the fact that Plaintiffs were Black. Five or the fourteen police who went to serve the warrant were Black. The first officer into the apartment was Black.

Plaintiffs sought to fulfill the *Griffin* requirement, not by evidence that each Defendant had a class based invidiously discriminatory animus, but rather that Cointelpro provided it. Cointelpro was a creation of the FBI at the highest levels in Washington whose very existence was confined to *internal* dissemination, as the

Plaintiffs proved at trial and concede below. The only evidence concerning State Defendants and Cointelpro was that they did not know about its existence. Yet, Plaintiffs contend Cointelpro was the core of the conspiracy.

According to *Griffin, id.* 102, the invidiously discriminatory animus must be *behind* the *conspirators' action*, not just one conspirator's action. Whoever is to be held liable *must* have such an animus. The class based invidiously discriminatory animus may not be supplied by the incident itself or its results. *Askew v. Bloemker*, 548 F.2d 673, 678 (7th Cir. 1976).

Other than Cointelpro, there was no evidence that the requisite animus existed prior to the incident or ever existed.

VII.

THE DECISION BELOW, BY SUSTAINING A CAUSE OF ACTION FOR CONSPIRACY TO VIOLATE 42 U.S.C. § 1983, HAS CREATED SUBSTANTIVE RIGHTS CONTRARY TO THE LAW AS ANNOUNCED BY THIS COURT.

In Counts 3, 6 and 8 certain State Defendants are alleged to have conspired to deprive Plaintiffs of equal protection of the laws violating 42 U.S.C. § 1983, conspired to deprive civil rights by false imprisonment in violation of § 1983, and conspired to deprive Plaintiffs of equal protection of the laws and due process rights by malicious prosecution in violation of 42 U.S.C. § 1983.*

* Plaintiffs have also charged State Defendants with a conspiracy to violate § 1985(3) and certain Amendments to the Constitution.

A. Under *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971) this Court in holding that § 1985 was not a general federal tort law held that:

> "The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the Congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment. See the remarks of Representatives Willard and Shellabarger, quoted *supra*, at 100, 29 L.Ed.2d, at 347. The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all."

Thus, proof of a § 1985(3) conspiracy requires some racial, or perhaps otherwise class based invidiously discriminatory animus. Congress, however, did not enact a Civil Rights Act making actionable a § 1983 conspiracy. Plaintiffs apparently seek to avoid this *Griffin* requirement by trying to pursue a § 1983 conspiracy theory.

B. At all times pertinent to the allegations of Counts 3, 6 and 8, Plaintiffs have asserted State Defendants acted under color of state law. In a case decided by this Court, the Court found that a conspiracy with an unsued state actor (a policeman) could satisfy the requirement of acting under color of state law (state action) *Adickes v. Kress and Co.*, 398 U.S. 144 (1970) so that one could sue the owners of a restaurant for a discriminatory act. The Court held that "First, the Plaintiff must prove that the Defendant has deprived him of a right secured by

the 'Constitution and Laws' of the United States. Second, the Plaintiff must show that the Defendant deprived him of this constitutional right 'under color of any statute, ordinance . . .' " *id.* 50.

A reading of the Court's opinion (A. 36-37), demonstrates that the Court below has not followed *Adickes*, but has determined that if there is *prima facie* proof of *any* constitutional deprivation by any single defendant then all can be held in, on an allegation of conspiracy to violate § 1983. This presupposes that Section 1983 provides for substantive rights which Petitioners are alleged to have deprived, yet this Court has held to the contrary:

> ". . . § 1 of the Civil Rights Act of 1871 did not provide for any substantive rights—equal or otherwise. As introduced and enacted, it served only to ensure that an individual had a cause of action for violations of the Constitution, which in the Fourteenth Amendment embodied and extended to all individuals as against state action the substantive protections afforded by § 1 of the 1866 Act. No matter how broad the § 1 cause of action may be, the breadth of its coverage does not alter its procedural character. Even if petitioners are correct in asserting that § 1983 provides a cause of action for all federal statutory claims, it remains true that one cannot go into court and claim a violation of § 1983—for § 1983 by itself does not protect anyone against anything. As Senator Edmunds recognized in the 1871 debate, 'All civil suits, as every lawyer understands, which this act authorizes, are not based upon it; they are based upon the right of the citizen. The act only gives a remedy'". *Chapman v. Houston Welfare Rights Organization*, ... U.S. ....., 60 L.Ed. 2d 508, 522, 523 (1979).

Petitioners submit that only those who participated in the alleged constitutional deprivation may be held liable under § 1983 and not those who allegedly conspired to deprive Plaintiffs of constitutional rights. In holding to the contrary, the Court below is directly in conflict with two of this Court's decisions, *Adickes* and *Chapman*. (See also: *Great Am. Fed'l S & L v. Novotny*, ... U.S. ....., 99 S.Ct. 2345 (1979)).

VIII.

THE COURT BELOW IS IN CONFLICT WITH OTHER CIRCUITS IN PLACING THE BURDEN OF PROVING GOOD FAITH ON DEFENDANTS.

Of the State Defendants, only Hanrahan, Jalovec (the State's Attorney and his assistant) and those officers who shot their weapons at the apartment took the witness stand. All Defendants except the officers who fired their weapons (herein the shooters) were directed out at the close of Plaintiffs' case.

The non-shooters are those six police officers at the premises assigned to the outside in front and in back of the premises who never fired a weapon, the four police officers who administered the internal police disciplinary procedure and the crime lab firearms examiner. Not one of these policemen was called to testify by the Plaintiffs. No Plaintiff ever identified any of them, and further, no Plaintiff testified how any one of them caused them any damage.

By reversing the directed verdict in their favor, the Court below has thus required them to prove their good faith without there having been any evidence introduced of their lack of good faith.*

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* The State Defendants who did testify—Hanrahan and Jalovec during Plaintiffs' case-in-chief—and the shooters who

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In *Scheuer v. Rhodes*, 416 U.S. 232 (1974) this Court held that one of the rationales for qualified immunity was that ". . . the danger that the threat of such liability would deter his [an official's] willingness to execute his office with the decisiveness and the judgment required by the public good." 416 U.S. at 240. In the case at bar, these men stood trial (sixteen months for all but the shooters, eighteen months for the shooters) *without* Plaintiffs' introducing evidence of lack of good faith. No evidence was introduced that they ever heard of Cointelpro, which Plaintiffs have conceded and which they have asserted was at the "core" of the conspiracy. Evidence was introduced during Plaintiffs' case that Cointelpro had only internal dissemination within the FBI.

To carry out this Court's holdings that the concept of qualified immunity encouraged unhindered, prompt decision-making by those who govern and protect the public, the Fifth Circuit in *Cruz v. Beto*, 603 F.2d 1178 (1979), and the First Circuit in *Kosta v. Hogg*, 560 F.2d 37 (1977) have placed the burden of showing lack of good faith on the plaintiff. In the Seventh Circuit, as a result of the opinion of the court below, if Defendants assert that a verdict should be directed in their favor at the close of Plaintiffs' case for, among other things, failure to prove good faith (and in addition for those State Defendants that took the witness stand, plus Sadunas, that good faith was affirmatively proved and

footnote continued
were required to present a defense, affirmatively, through their own testimony, established good faith. The good faith of Sadunas, the firearms examiner, was established by Plaintiffs' own witness Zimmers (see Statement of Case, VIII, Tr. 20258, PX 427) Therefore, these State Defendants actually proved their defense even under a qualified immunity standard at trial.

unrebutted in Plaintiffs' case), State Defendants are still required to put on their case of good faith. State Defendants submit that the Circuits are in conflict concerning the implementation at trial of the defense of good faith as set forth in *Pierson v. Ray*, 386 U.S. 547 (1967); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Wood v. Strickland*, 420 U.S. 308 (1975); *Procunier v. Navarette*, 434 U.S. 555 (1978); and *Butz v. Economou*, 438 U.S. 478 (1978), and that certiorari should be granted to resolve the conflict.

IX.

THE *EN BANC* PROCEDURE OF THE COURT BELOW CONFLICTS WITH THE NORMS SET BY THIS COURT AND THE INTENTION OF CONGRESS.

A. The first time Defendants learned that two of the eight active judges recused themselves from this case was through footnote 3 at page 112 of the dissent. This left the Court with six judges out of nine to consider a petition for rehearing *en banc*. There was at the time one vacancy out of the nine in the Seventh Circuit. This vacancy was filled by Judge Cudahy who was confirmed by the United States Senate shortly after Defendants' petition for rehearing *en banc* was denied.

Having thus learned that there were two recusals, State Defendants argued in their petition for rehearing *en banc* that such judges should nevertheless at least vote on the question of whether or not to hear the case *en banc*. This Court has ruled that:

> ". . . voting on the merits of an *en banc* case is quite different from voting whether to rehear a case *en banc*, which is essentially a policy decision of judicial administration." *Moody v. Albermarle Paper Company*, 417 U.S. 622, 627 (1974).

As one commentator has aptly reasoned:

> ". . . if an active judge is disqualified from participation in an *en banc* decision, he still should be able to vote on the question of whether to hear the case *en banc*. A vote to sit *en banc* involves considerations of effective judicial administration and does not constitute a vote on the litigant's claim. Also, allowing the disqualified judge to vote on the *en banc* question has the further advantage of allowing the full membership to determine more accurately the likelihood of subsequent disagreement with the panel decision." 40 N.Y.U.L.R. 726, 736 (1965).

B. State Defendants argued to the Seventh Circuit in their petition for rehearing *en banc* that, in the event that Judges Bauer and Wood persisted in their recusal, other judges should be assigned to the circuit for this purpose. The Chief Judge has the power to obtain other judges under 28 U.S.C. § 291(a).

On September 12, 1979 the court of appeals issued an order which said that Judges Tone, Sprecher and Pell voted for rehearing *en banc*, Judges Swygert, Fairchild and Cummings voted to deny the rehearing *en banc*, and Judges Bauer and Wood recused themselves. The Seventh Circuit Court of Appeals is composed of nine judges. 28 U.S.C. § 44(a).

There was no published procedure established by the Seventh Circuit informing litigants what the procedure would be in the event of recusal. Here three judges determined the law of a circuit, composed of nine judicial positions. Congress enacted 28 U.S.C. § 46(c) which provides: "A court *en banc shall* consist of all circuit judges in regular active service . . ." (Emphasis added).

"Shall", State Defendants submit, makes it mandatory, not hortatory. Moreover, if it doesn't, the Seventh Circuit should have been filled as 28 U.S.C. § 291(a) provides.

In *Hickman v. Taylor*, 153 F.2d 212 (3rd Cir. 1945), *aff'd*, 329 U.S. 495 (1947), Judge Stephens, a regular active circuit judge of the Ninth Circuit sat *en banc* in the Third Circuit. This out-of-circuit regular active judge sat on the Third Circuit whose *en banc* procedure, unlike the Seventh, had been fully revealed.

Sitting with him was Judge Maris, the leading authority on *en banc* procedure, whom Justice Vinson tells us as the ". . . Chairman of the Judicial Conference Committee on the revision of the Judicial Code submitted a memorandum to the House Committee of Laws" and whose proposal on *en banc* ". . . was the genesis of the present 46(c)." *Western Pacific Railroad Case*, 345 U.S. 247, 253, 254 (1953).

C. The Seventh Circuit's allowing recusal without replacement by regular active circuit judges is contrary to the intent of 28 U.S.C. § 46(c).

House Report No. 1246, 77th Congress, 1st Session, sets forth the meaning of the antecedent of 28 U.S.C. § 46 as follows:

> ". . . The bill adds a provision that . . . the majority of the circuit judges may provide for a court of all the active and available circuit judges of the circuit to sit *en banc* when in their opinion such action is advisable. If the Court can sit *en banc*, the situation where two three-judge courts may reach conflicting conclusions is obviated. It also will obviate the situation where there are seven members of the court and as sometimes happens a decision of two

judges (there having been a dissent) sets the precedent for the remaining judges. A similar result would be avoided with a court of five judges." (emphasis added).

Moreover, by reduction of the available judges to sit *en banc* from nine to six, resulting in a tie vote in this case, the Seventh Circuit's *en banc* procedure failed to conform to what this Court has held 28 U.S.C. 46(c) requires, as follows:

> "We hold that the statute does not compel the Court to adopt any particular procedure governing the exercise of the power; but whatever the procedure which is adopted, it should be clearly explained, so that the members of the court, and litigants in court may become thoroughly familiar with it, and further, *whatever the procedure which is adopted, it should not prevent a litigant from suggesting to those judges who, under the procedure established by the Court have the responsibility of initiating a rehearing en banc, that his case is an appropriate one for the exercise of the power." Western Pacific Railroad Case, supra,* p. 267, 268. (Emphasis added).

State Defendants submit that petition for certiorari should be granted on this issue alone, if for no other reason than this case took about 18 months to try, with 38,000 pages of transcript. This case has been before panels of the Seventh Circuit three different times, and after remand may well come up again. Moreover, if this Court does not take certiorari, irrevocable changes of position will occur, for example, payment of attorneys' fees and disclosure of informant.

X.

PUBLIC OFFICIALS HAVE A FIRST AMENDMENT RIGHT TO RESPOND TO ACCUSATIONS OF MISCONDUCT.

The Seventh Circuit has erroneously held that the publicized statements by certain of the Defendants (particularly State's Attorney Hanrahan and policemen who fired) in response to charges of murder, are actionable under 42 U.S.C. § 1983. The court below indicated that the trier of fact should have the opportunity to determine whether circulation of these reports to the media was for the purpose of causing pretrial prejudice, covering up and justifying the continuation of Plaintiffs' detention. Defendants had a First Amendment right to respond to the accusations.

Since the indictments of the Plaintiffs were later dismissed on the State's motion, their defense could not have been prejudiced by any publicity. In addition, because of the demonstrations and violence that had occurred in the community, it was well within Hanrahan's prosecutorial authority and, more importantly his duty, to take steps to prevent a total breakdown of law enforcement in Cook County. Hanrahan testified that he had a public responsibility to do everything possible to prevent public outbreaks of violence and that he did what he did in good faith as he perceived his public responsibilities.

The Seventh Circuit, State Defendants believe, dangerously misperceives the law, in holding that the TV reenactment and press conference are *in themselves* actionable under § 1983. First, it is clear that under *Paul v. Davis*, 424 U.S. 693 (1976), the Plaintiffs cannot recover damages for injury to reputation.

Second, this Court, in *Wood v. Georgia*, 370 U.S. 375 (1962) commenting on the public statements of a sheriff attacking a judge's decision said that:

> "The role that an elected official shall play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of public importance." *Id.*, p. 395.

Hanrahan, of course, was an elected official at the time he had press conferences and arranged the Tribune Exclusive and TV reenactment, but he was also the public prosecutor—now immunized under *Imbler**—who shared the same type of immunity as members of the executive branch of government for their public statements. *Barr v. Matteo*, 360 U.S. 564, (1959).

Third, the Seventh Circuit wrongly interpreted *Barr v. Matteo, supra*, as having been modified by *Butz v. Economou*. *Butz* does not apply since Petitioner Hanrahan was the elected and chief law enforcement officer of Cook County and it was one of his duties to disseminate information about crime. The right of freedom of comment by a prosecutor and police officers, who have in public been called murderers, is not actionable under *Barr v. Matteo*. *Butz v. Economou* was decided in 1978, nine years after the incident and under *Wood v. Strickland*, 420 U.S. 308 (1975), the application of *Butz* should be prospective.

Fourth, if the public statements by these Defendants were used to justify the continuation of Plaintiffs' deten-

* Judge Pell, in his dissent, correctly stated (A. 113) that the involvement of Hanrahan in public statements and media publicity was of far less egregious nature than that which has been involved in cases of absolute immunity where prosecutors were engaged directly in the prosecutorial process.

tion and also deprived them of their right to a speedy trial, nevertheless this action is immunized under *Imbler v. Pachtman, supra*, and the instant decision is in conflict with the Fifth Circuit: *Prince v. Wallace*, 568 F.2d 1176 (5th Cir. 1968), the Eighth Circuit: *Ledwith v. Douglas*, 568 F.2d 117 (8th Cir. 1978), and their own Seventh Circuit, *Tyler v. Witkowski*, 511 F.2d 449 (7th Cir. 1975).

Although Defendants have vigorously denied, and no evidence showed any knowing or malicious distribution of false public reports, *Imbler* along with *Yaselli v. Goff*, 12 F.2d 396 (2nd Cir. 926), affirmed 275 U.S. 503 (1927) (referred to in *Imbler*) hold that an allegation of a prosecutor's procuring a grand jury indictment or his use at trial of allegedly false and misleading evidence, are not actionable. Clearly then, the lesser action of knowing, wilful or malicious distribution of false official reports is, likewise, immunized by *Imbler*.

Fifth, prior to December 4, 1969, the occupants of 2337 Monroe were all members of the Black Panther Party. Hampton and Truelock were convicted felons. The six others, in their way, sought to promote through the media and the Black Panther Party newspaper their efforts at promulgating the Party's aims. These people, as the Plaintiffs have shown us, worked for the Party, some full time, some part time. As stated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974): "More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." In either event, they invite attention and comment which all Plaintiffs and the Black Panther Party did in 1969. They were public figures.

The public statements by certain State Defendants complained of by Plaintiffs should be immunized as protected by the First Amendment.

XI.

AS CONSTRUED AND APPLIED BY THE COURT BELOW 42 U.S.C. § 1988 VIOLATES DEFENDANTS' CONSTITUTIONAL RIGHTS, IS CONTRARY TO CONGRESS'S INTENT AND CONFLICTS WITH OTHER CIRCUITS.

A. In *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412 (1978) construing a similar civil rights fee statute, 42 U.S.C. § 2000e-5(h), this Court set forth the rationale behind awarding fees for the prevailing party, as follows:

> "First, as emphasized so forcefully in *Piggie Park*, the plaintiff is the chosen instrument of Congress to vindicate a policy that Congress considered of the highest priority, 390 U.S. at 402. Second, when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law." *Id.*, 418, 419.

In the present case, there has been *no* finding or determination that any State Defendant was a "violator of federal law", thus, it remains to be seen whether Plaintiffs will "vindicate a policy that Congress considered of the highest priority." In the District Court all Defendants at the close of Plaintiffs' case moved for directed verdicts more than fifteen months after Plaintiffs began presenting their evidence. Directed verdicts at the close of Plaintiffs' case were granted for all nonshooters. At the close of all of the evidence, the remaining State Defendants, police officers who fired their weapons, renewed their Motions for Directed Verdict,

which after the jury was deadlocked, were granted. Merely because the Circuit Court reversed the District Court, the Circuit Court has seen fit to award attorneys' fees against the State Defendants based on 42 U.S.C. § 1988 for their appellate work (Opinion, A. 76). Defendants have been thereby penalized for their efforts on appeal. To so construe 42 U.S.C. § 1988 violates the right of Defendants of access to the courts, both in defending the appeal prosecuted by Plaintiffs and in vigorously defending themselves at trial. The opinion in the Seventh Circuit has a chilling effect on their right to defend, and their right not to have their property taken away as guaranteed by the Fifth Amendment.

In *Wolf v. McDonnell*, 418 U.S. 539, 579 (1974) the United States Supreme Court held in a case which alleged interference with the right of access to courts for civil suits:

> "The right of access to the courts . . . is founded on the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights."

B. Congress intended that fees to "prevailing" parties be paid upon proof or admission of violations of the Civil Rights Acts. However, no such proof or admission exists at the present time. It is unproven whether Plaintiffs *or* Defendants were enforcing the law. What was held in *Rinaldi v. Yeager*, 384 U.S. 305 (1966) is applicable to Defendants here:

> "This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to

the courts. We may assume that a State can validly provide for recoupment of the costs of appeals from those who later become financially able to pay. But any such provisions must, under the Equal Protection Clause, be applied with an even hand." *Id.*, 310, 311.

This Court has also found that Congress has sought to apply an "even hand" in civil rights litigation, holding in *Christiansburg*:

". . . Furthermore, while it was certainly the policy of Congress that Title VII plaintiffs should vindicate a 'policy that Congress considered of the highest priority', *Piggie Park*, 390 U.S. at 402, it is equally certain that Congress entrusted the ultimate effectuation of that policy to the adversary judicial process. *Occidental Life Ins. Co. v. E.E.O.C.*, 432 U.S. 355. A fair adversary process presupposes both a vigorous prosecution and a vigorous defense." *Id.* 419.

1. Appellate attorneys' fees should not now be awarded because Plaintiffs have not yet been determined to be the "prevailing party" on the merits under 42 U.S.C. § 1988. This is clearly the law as determined by Congress and the United States Supreme Court.

This Court has held that in cases (preceding passage of present § 1988) of the type now before this Court no fees at this juncture may be awarded. The Court set forth that the "American Rule" was that the *prevailing* litigant is ordinarily not entitled to collect reasonable attorney's fees from the loser." *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975). (Emphasis added). *Alyeska* dealt with final fees—not even interim fees.

Plaintiffs in the instant case under the holding in *Alyeska* may only get fees for this appeal if Congress by

specific statute has so authorized the fee shifting from Plaintiffs to Defendants under the circumstances present in this case.

2. The Civil Rights Attorneys' Fees Awards Act does not authorize fee shifting in this case at this time. Little was said by the Senate or the House, concerning the awarding of fees when a case is not decided on the merits, when it passed the Civil Rights Attorneys' Fees Awards Act in 1976.

The Judiciary Committee of the Senate in its report No. 94-1011, in the 94th Congress, 2nd Session, concerning the Civil Rights Attorneys' Fees Awards Act demonstrated its intention by saying at page 5 that:

"In appropriate circumstances, counsel fees under S. 2278 may be awarded pendente lite. See *Bradley v. School Board of the City of Richmond*, 416 U.S. 696 (1974). Such awards are especially appropriate where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues. See *Bradley, supra; Mills v. Electric Auto Lite Co.*, 396 U.S. 375 (1970). Moreover, for purposes of the award of counsel fees, parties may be considered to have prevailed *when they vindicate rights* through a consent judgment or without formally obtaining relief. *Kopet v. Esquire Realty Co.*, 523 F.2d 1005 (2nd Cir. 1975) and cases cited therein. *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970); *Richards v. Griffith Rubber Mills*, 300 F.Supp. 338 (D. Ore. 1969); *Thomas v. Honeybrook Mines, Inc.*, 428 F.2d 981 (3rd Cir. 1970); *Ospira of New York, Inc. v. Board of Education of the City of New York*, 65 F.R.D. 541 (S.D.N.Y. 1975)". (Emphasis added).

Similarly, Congressman Drinan, the sponsor of the HR 15460, the House version of The Civil Rights At-

torneys' Fees Awards Act, submitted the Report for the Committee on Judiciary showing the same Congressional intent by saying in regard to interim fees:

> "Furthermore, the word 'prevailing' is not intended to require the entry of a *final* order before fees may be recovered. . . . While the courts have not yet formulated precise standards as to the appropriate circumstances under which such interim awards should be made, the Supreme Court has suggested some guidelines. '(T)he entry of any order that determines substantial rights of the parties may be an appropriate occasion upon which to consider the propriety of an award of counsel fees . . .' *Bradley v. Richmond School Board, supra* at 722 N. 28." House Report No. 94-1558, 94th Congress, 2nd Session, p. 8.

Both House and Senate Reports cite *Bradley* and *Mills* as cases which are indicative of the type in which interim awards may be allowed to a prevailing party. Neither case is of the type that the instant case is. Both awarded interim fees *only after substantive issues on the merits had been decided leaving open only the question of remedy to be applied or amount of damages to be awarded.* Both cases force the conclusion that Congress did not intend that attorneys' fees should be awarded at this stage.

3. *Bradley v. Richmond School Board,* 416 U.S. 696 (1974) was a "protracted school desegregation . . ." case (*id.* 6986 under 42 U.S.C. § 1983, in which the District Court had been previously reversed by the Supreme Court, 382 U.S. 103, and in which further relief had been sought as to the *type* of desegregation plan which was appropriate due to later Supreme Court decisions.) The District Court awarded interim attorneys' fees. Thus, upon Plaintiffs' proof of discrimination it was a prevailing party. They were entitled to attorneys' fees—

even though the final decision on method of implementation was not yet determined. However, the basic liability issue in the case *sub judice* has not yet been determined, contrary to *Bradley.*

4. Also relied upon by the House and Senate is *Mills v. Electric Auto Lite Co.,* 396 U.S. 375 (1970). There the Plaintiffs brought suit for violation of the Securities Exchange Act. The Court held in this stockholders' suit that:

> ". . . our conclusion that *petitioners have established their cause of action indicates that the Court of Appeals should have affirmed the partial summary judgment on the issue of liability.* The result would have been not only that respondents, rather than petitioners, would have borne the costs of the appeal, but also, we think, that *petitioners would have been entitled to an interim award of litigation expenses and reasonable attorneys' fees. . . .*" *Id.* 389. (Emphasis added).

Thus the House and Senate both recognized in their reports concerning the Civil Rights Attorneys' Fees Awards Act that *once the substantive violation had been proved,* as in *Mills* and *Bradley,* the Plaintiffs are considered to have prevailed and the Court may award fees.*

No substantive violation has been proved in the instant case and the Plaintiffs have not prevailed. To award fees at this juncture is tantamount to awarding

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* The remaining cases cited in the above cited Senate Report fall into the same pattern. All of those remaining cases relied on in the Senate and House reports reflect the Legislative intent that interim attorneys' fees may be awarded under the Civil Rights Attorneys' Fees Awards Act only where it is clear that the statutory violation *was first proved (or admitted)* and/or the ultimate relief sought was substantially achieved by the prevailing party.

Plaintiffs' fees at the close of their case-in-chief and prior to the presentation of the defense. Plaintiffs herein have sought $47,000,000.00 in damages and have asked for an appellate attorneys' fees award of up to $1.4 million dollars. No proof of deprivation of constitutional rights has been made.

C. The instant case is not the type of case to which the Civil Rights Attorneys' Fees Awards Act of 1976 is applicable.

Senator Tunney said when he introduced the Civil Rights Attorneys' Fees Awards bill, "In the typical case that arises under these statutes, the citizen whose rights have been violated has little or no money with which to hire a lawyer, and *there is often no damage claim from which an attorney could draw his fee.*" 121 Cong. Rec. S14975 (August 1, 1975) (Emphasis added). Certainly this is not true here. This *is* a damage claim.*

Senator Kennedy, a floor leader on the bill during the bill's debate, likewise said,

> "For there is [sic] often important principles to be gained in such litigation, and rights to be recovered or enforced, *but just as often no large promise of monetary recovery lies at the end of the tunnel. So civil rights cases—unlike tort or antitrust cases do not provide the prevailing plaintiff with a large recovery from which he can pay his lawyer.* . . . In the traditional contingency case, the lawyer is assured of a high percentage of a monetary award should he win." 122 Cong. Rec. S17052. (Emphasis added).

* This case is a case to redress an alleged private wrong and not the type of case warranting attorneys' fees because Plaintiffs' attorneys have contingent fee contracts. *Zarcone v. Perry*, 581 F.2d 1039 (2nd Cir. 1978), *cert. den.*, 99 S.Ct. 843. See also *Samuel v. Benedict*, 573 F.2d 580 (9th Cir. 1978).

Plaintiffs in the instant case ask $47,000,000.00 in damages and *for their attorneys* appellate fees of $1,400,000.00 *in addition to their contingent fee contract percentages of* damages awarded in the event they ultimately prevail. Nothing is asked for the public. They are not acting as private attorneys general "for the benefit of the public" but instead are acting for themselves individually.

D. Petitioners submit that rulings in the Fourth, Fifth, Ninth and D.C. Circuits construe § 1988 or statutes similar to it and hold that interim fees should be denied Plaintiffs until they first prove discrimination or statutory violation or unless and until Petitioners admit discrimination.

1. The following Fifth Circuit cases hold "With the failure to prove discrimination the award of attorneys' fees fails." *Thomas v. J.C. Penney Co., Inc.*, 531 F.2d 270, 271 (5th Cir. 1976); Citing *Hester v. Southern Railway Co.*, 497 F.2d 1374 (5th Cir. 1974); *Whiteside v. Gill*, 580 F.2d 134 (5th Cir. 1978).

2. In the event that Petitioners, in the future, obtain a jury verdict in their favor, but the Circuit Court has already awarded interim fees to these Plaintiffs, the Seventh Circuit will be "requiring the substantive prevailing party largely to subsidize his losing opponent's procedural victories," which would be contrary to the Fifth Circuit holding in *U.S. v. Alleghany Ludlam Industries*, 558 F.2d 742 (5th Cir. 1977).

3. *Grubbs v. Butz*, 548 F.2d 973, 976 (D.C. Cir. 1976) was a sex discrimination case in which the District Court had ruled against Plaintiff and upon Plaintiff's appeal was reversed. Plaintiff, then because of this successful

reversal, sought attorneys' fees pursuant to 42 U.S.C. § 2000e-5(k) which provides that the court, in its discretion, ". . . may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . ." The Court finding this claim premature, denied it, holding:

> ". . . *Since Congress was solicitous enough of the rights of innocent Title VII defendants to authorize awards of attorneys' fees in their favor, we cannot believe Congress would have countenanced assessing fees against a defendant absent any showing of discrimination.* For all we know, the defendants in this case may be entirely blameless. If attorneys' fees were assessed against them at this point in the litigation, the ultimately successful party might end up having subsidized a large segment of the losing party's suit against him. While that prospect might be consonant with the goals of a statute authorizing fee awards to *any* party, we find it contrary to the purposes of one that provides for awards only to the party who prevails. *It follows that since Ms. Grubbs has yet to demonstrate discrimination an award of counsel fees would be inappropriate at this time.* . . ." *Id.* 976. (Emphasis added).

As shown above, Congress was equally as solicitous of the right of innocent (42 U.S.C. § 1983 *et seq.*) defendants, and that statute is in *pari passu* with 42 U.S.C. § 2000e-5(k); State Defendants submit this Court should not ". . . believe Congress would have countenanced assessing fees against a defendant absent any showing of discrimination." *Id.* 976.

4. In a Ninth Circuit voting rights case, Plaintiff's complaint was dismissed by the District Court, which in turn was reversed by the Court of Appeals and remanded, holding:

> "Finally, both parties seek attorneys' fees. Title 42 U.S.C. § 1973 1(e) permits this Court, in its discretion, to allow attorneys' fees to the 'prevailing party' in "any action to enforce the voting guarantees of the Fourteenth and Fifteenth Amendment."
>
> "*No issue on the merits has been finally determined in favor of any party.* Any award of attorneys' fees can await the outcome of the action in the district court. When the prevailing party has been determined, the district court may consider in any award of attorneys' fees the effort expended in the appeal by the attorneys for the party that ultimately prevails." *Chinese for Affirmative Action v. Leguennec*, 580 F.2d 1006, 1009 (9th Cir. 1978) *cert. den.* 99 S.Ct. 1047. (Emphasis added).

5. In *Bly v. McLeod*, 605 F.2d 134 (4th Cir. 1979) the Court held "In order to recover attorneys fees and costs, plaintiffs must show at least some success on the merits." *Id.* 137. See also: *Bonner v. Long*, 599 F.2d 1316 (4th Cir. 1979).

The Court below is in conflict with the intent of Congress, other Circuits and holdings of this Court in awarding fees at this time.

CONCLUSION

Wherefore, Petitioners State-Defendants pray that this Court, in view of the foregoing, issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

JOHN O. TUOHY
Special Assistant Corporation
Counsel, City of Chicago
111 West Washington Street
Chicago, Illinois 60602

JOHN P. COGHLAN
Special State's Attorney
of Cook County
JOSEPH S. WITKOWSKI
Assistant Special State's Attorney
111 West Washington Street
Chicago, Illinois 60602

Counsel for Petitioners